In the

Supreme Court of the United States

October Term, 1961

No. 304

Continental Ore Company, a Partnership, and Henry J. Leir, Erna D. Leir, Lina Schloss, as Individuals and as Partners Under the trade name and style of Continental Ore Company,

Petitioners,

—vs.—

Union Carbide and Carbon Corporation; United States Vanadium Corporation; Electro Metallurgical Sales Corporation; Electro Metallurgical Company of Canada, Limited; Vanadium Corporation of America,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT VANADIUM CORPORATION OF AMERICA

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Questions Presented

This Court limited this appeal to three questions. Its order set forth those questions as posed in the petition for certiorari (R. 2584-2586; Pet. Br., pp. 4-5).[1] But the

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[1] All "R." references are to pages of the printed Transcript of Record, which consists of nine volumes. Volumes VI and VII contain the exhibits printed in the court below; Volume VII also

language used by petitioners in framing these questions, and the inclusion in their statement of the case of much that is not material to the consideration of these questions, present a distorted picture of the posture of the case as it comes to this Court and of the limited nature of the issues here to be decided.

The basic question, simply stated, is whether the proof proffered by petitioners was sufficient rationally to permit a finding that they had in fact been injured in their business by acts of the respondents forbidden by the antitrust laws.

Statement of the Case

1. *Introduction*

Petitioners, suing for treble damages under section 4 of the Clayton Act, had to prove that they were "injured in [their] business or property by reason of" something forbidden in the antitrust laws (15 U. S. C. §15; Pet. Br., p. 3). Their complaint therefore alleged, whatever may be petitioners' theory now, that they were eliminated "from the industry of independent producers and distributors of ferro-vanadium and vanadium oxide" as "one of the direct effects proximately caused" by respondents' alleged mo-

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includes the opinion and orders of the court below and the order allowing certiorari (R. 2565-2586). Volumes VIII and IX contain the additional exhibits printed in this Court.

All references to exhibits are followed by the pages of the Record at which the exhibit appears and at which it was offered in evidence. Where the exhibit appears in Volume VIII or IX, the volume is also included.

All references to "Pet. Br." are to pages of "Petitioners' Opening Brief" in this Court.

All italics in this brief are ours unless otherwise indicated.

nopolistic practices (R. 16, par. 30; see also R. 23-24, par. 45).[2]

A jury, after a three week trial, returned a general verdict for respondents. Petitioners appealed from the judgment entered on that verdict, contending it was the product of varied errors committed in the course of trial.

The Court of Appeals considered only whether petitioners had supported their essential allegations of proximate cause—"Our problem is to determine whether or not the evidence could have justified jury findings that [respondents'] alleged illegal acts were in fact the cause of [petitioners'] failure in various adventures into the business" (R. 2572). Concluding the evidence could not support such findings, the Court of Appeals affirmed the judgment for respondents (R. 2572-2573, 2583).

The three questions on which certiorari has been granted relate only to whether the record—including certain evidence petitioners offered, if admissible—could support a finding of the necessary causal connection between respondents' alleged wrongdoing and petitioners' alleged loss. It is therefore unnecessary in this counter-statement to correct petitioners' varied misrepresentations of the evidence on questions not before this Court (Rule 40(e)).

But it should be emphasized at the outset that the trial court and the Court of Appeals took nothing away from the jury, nor did the Court of Appeals order a directed

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[2] The same monopolistic practices were alleged in an indictment returned against respondents and others in June 1946 by a Federal Grand Jury at Denver, Colorado, which was later dismissed by the Government and superseded by a criminal information filed on September 2, 1948, entitled *United States v. Union Carbide and Carbon Corporation, et al.*, No. 11678, in the District Court for the District of Colorado (R. 22, pars. 41-42). After a full trial the criminal action was terminated by a jury acquittal of all defendants on June 4, 1957. No civil suit was brought by the Government at any time.

verdict against petitioners, despite petitioners' suggestions in Questions 1 and 3 (Pet. Br., pp. 4-5). The case had been submitted to the jury and the jury returned a general verdict for respondents (R. 2051).

Nor does the submission of the case to the jury indicate, as petitioners argue, that "the trial judge thought that the evidence presented a factual jury issue" (Pet. Br., pp. 67, 91-92). The trial judge had reserved decision on respondents' motion for a directed verdict (R. 1989). When the jury returned its verdict for respondents, he unmistakably expressed his concurrence with it (R. 2052). It may be, of course, that he personally disbelieved the testimony of Blair Burwell, the patently disgruntled former vice-president of one of the Union Carbide subsidiaries, on whom petitioners rely so heavily and who alone in the entire record supposedly "admitted" and "confessed" the destruction of petitioners to be "an important goal of the monopolists" (Pet. Br., pp. 4, 68).[3] Perhaps the trial judge agreed with the jury because he saw no sufficient evidence of conspiracy or for a number of other reasons. But, with his reservation of decision on the motions for a directed verdict, nothing supports petitioners' inference that he thought they had presented a jury question on the causation issue.

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[3] Petitioners have evidently found it convenient to use the collective "respondents," without distinguishing between those in the Union Carbide group and the independent Vanadium Corporation of America. The result is frequently misleading.

Thus petitioners refer to "a confession by one of respondents' Chief Executive Officers" (Pet. Br., p. 18). This alleged confession came from the same Blair Burwell. The record shows only that he had been a vice-president of United States Vanadium Corporation, one of Union Carbide's subsidiaries, and the assistant to the vice-president in charge of its mining operations (R. 137).

Of course, there was no admission at all. Burwell, at the time of trial, was not connected with any respondent, and never had been a director, officer or employee—much less one of the chief executive officers—of Vanadium Corporation of America.

So too the questions on which certiorari has been granted make it unnecessary to consider the sufficiency of the evidence of respondents' alleged violations of the Sherman Act (Pet. Br., pp. 14-36). But nothing supports petitioners' further claim, in Question 1, that this alleged monopoly was "admittedly achieved pursuant to an intent to monopolize" or that the "question of violation is confessed" (Pet. Br., p. 4; see also, *e.g.*, pp. 16, 18, 68, 69, 74, 78). Indeed, all respondents bitterly contested these charges of violation and, as the Court of Appeals noted, challenged the sufficiency of petitioners' evidence on this issue (R. 2572).[4]

The Court of Appeals did not find evidence of violation; it merely "*assumed*" that such evidence was adequate, without discussion, because it had concluded that the judgment clearly had to be affirmed by reason of a fatal failure of proof of causal connection. In short, no violation of the statute was confessed or admitted by any respondent or, in view of the jury's verdict, proved against it.[5]

Similarly immaterial here are the numerous and varied other alleged errors in the conduct of the trial and the charge to the jury which petitioners specified in the Court of Appeals, some of which they repeat here (Pet. Br., p. 67, App. A). The Court of Appeals could have con-

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[4] As noted below, petitioners' business was the purchase and sale of vanadium oxide or the conversion of such oxide into ferrovanadium. But there was no proof that petitioners did not have adequate supplies or that additional supplies were not available to them (*infra*, pp. 8-10, 29-42).

[5] Petitioners' Question 1 also argues that "the issue of measurement of damages is more than sufficiently supported by relevant economic data" (Pet. Br., p. 4).

Here too, as the Court of Appeals noted, respondents challenged the sufficiency of the evidence (R. 2572). Here again its sufficiency was *assumed*, without discussion, by the Court of Appeals because of the affirmance of the judgment below on another ground (R. 2572).

sidered each in turn, found them baseless or harmless and affirmed the judgment for respondents. Instead it found such consideration unnecessary, again because the judgment had to be affirmed for failure of proof of causation (R. 2576, 2579, 2581, 2582-2583).

The basic question, therefore, is whether the Court of Appeals was correct in its disposition of the appeal. Its opinion reflects a meticulous detailed review of the evidence—looking "not only at all the evidence admitted by the trial judge, but also at all the evidence offered by [petitioners] but excluded below" (R. 2572). We submit that the record, viewed most favorably to petitioners, permits only the conclusion below that the evidence was insufficient to justify a verdict that the "necessary causal relation existed" between the alleged illegal acts and petitioners' failure (R. 2572-2573), and that that conclusion permitted no result except affirmance of the judgment for respondents entered on the jury's verdict (R. 2583).

2. *The Vanadium Industry*

Vanadium is a metallic element found domestically, in the same ores as is uranium, in a four-state area known as the Colorado Plateau (R. 7-8, Comp. pars. 12, 14 not denied; R. 139-140). The ores are first mined and then milled into vanadium oxide at mills near the ore deposits, on the Colorado Plateau (R. 1826-1827; Ex. 6, R. 2069-2071, 115; Ex. 7, R. 2072, 116). The oxide is then converted, in electric furnaces or through an aluminothermic process at plants in the East, into ferrovanadium (*Ibid.;* R. 1827-1828).

Ferrovanadium, the finished product, is an alloy used to harden steel and the steel companies are the major customers for it (R. 7, Comp. pars. 12, 13 not denied; R. 1525-1529; R. 1824-1825). When added to steel, as peti-

tioners admit, ferrovanadium increases the strength of the steel and provides toughness necessary for use in the manufacture of high speed tools, machine and automobile parts and armor plate (Pet. Br., p. 6, note).

Vanadium was a declining industry before World War II because of competition from molybdenum and other cheaper alloys (R. 146, 155, 157, 1528, 1682). Respondents made major efforts to find new uses for vanadium (R. 153, 1689, 1823-1826). Sales, not production, was the problem.

The industry was easy to enter. The ore was plentiful (R. 139, 1553). As petitioners conceded, anyone could find it, mine it and mill it (R. 1199). In 1938, when petitioner Leir came to this country, a plant could be built for about $50,000 to produce 15,000 pounds of vanadium oxide a month (R. 210). But, as petitioners soon discovered, anyone could simply buy vanadium oxide already milled and either sell it or make ferrovanadium at will.

The early stages of the war, however, produced a sudden spurt in demand, principally for weapons (R. 160, 189-190, 1526). The domestic surplus found a profitable market abroad (R. 1233-1234), but the conditions which led to increased demands also resulted in Government restrictions within a very short time.

In July 1940 vanadium was subjected to an embargo on exports (R. 1234). Even before the United States entered the war, there were priority allocations on vanadium as a strategic material, and later price regulation of vanadium oxide and ferrovanadium under the O.P.A. (Ex. U-5-P, R. 1367-1368; Ex. V-2-P, R. 1865-1867; Ex. U-5-O, R. 1363-1367; Ex. U-5-C, R. 985-986; 7 F.R. 4698; 7 F.R. 10934; 8 F.R. 17511; 10 F.R. 10429; Ex. V-2-M, R. 2555-2564, 1727-1728; Ex. U-5-D, R. 2462-2466, 987). Respondents were asked to increase their production substantially and quickly

(*infra*, p. 11). As petitioners' witness Burwell said of the 1941-1942 period, "and then the war hit us. And now we had a situation that was entirely different develop. For the first time there was no matter or question of who was your customer. Uncle Sam needed the vanadium" (R. 160).

In 1942 Metals Reserve Company, a Government corporation, started to buy up all the vanadium ore it could get in an effort to conserve it for war needs; prices went up and the supply tightened. Through ownership of mills and agreements with mill owners, Metals Reserve Company also took over much of the processing of the ores into vanadium oxide (R. 161; Ex. U-B, R. 2358-2363, 367; Ex. U-D, 2369-2381, 373; Ex. U-I, R. 2381-2384, 393; Ex. U-4-T, R. 2457-2458, 968; Ex. U-R, R. 2410-2416, 436-437).

Then in 1943 the United States Army began to acquire uranium-bearing properties for the secret Manhattan Project, the ultimate purpose being the production of materials for nuclear fission, including the atomic bomb (Ex. U-Q, R. 2397-2409, 418). By the end of 1943, the United States controlled vast quantities of vanadium and uranium ores and oxides (Ex. U-5-T, R. 2485, 1985). By 1944 the shortage was over, as petitioners concede (Pet. Br., p. 56). Vast quantities of vanadium ores and oxides became available, from private producers as well as the Government stockpile, and could not be sold (R. 527).

3. *The Parties*

A. Petitioners

Petitioner Continental Ore Company is a partnership composed of petitioners Henry J. Leir, his wife Erna D. Leir, and his mother-in-law Lina Schloss. The partnership succeeded in 1942 to the assets of Continental Ore Corpora-

tion, also controlled by the same three individuals (R. 1033). Leir was the guiding spirit of the corporation and partnership and there is no evidence that Mrs. Leir or Mrs. Schloss participated in the business in any way.

Leir, a native German, arrived in this country in 1938, after a five-year period in Luxembourg (R. 1034, 1045-1047). Like Continental's vice-president Martin Wolf who emigrated in late 1941 and joined him in early 1942, Leir was primarily a merchant and broker in ores and minerals (R. 787, 790-791, 1035-1046).

Not surprisingly, therefore, Continental during the period involved in this action, engaged in trading in a number of ores and minerals (R. 1083-1086, 1103-1104). It had no interest in mining vanadium ore on the Plateau—although Leir agreed "definitely" that anyone with sufficient financial resources could have acquired sufficient ore-bearing bodies and constructed a plant to produce vanadium oxide (R. 1199)—and vanadium was but a small part of its activities (R. 1083-1086, 1103-1104).

Continental never owned any mines or bought any ore on the Plateau (R. 897). There is no proof that it ever milled vanadium oxide. It had no one with training or practical experience in metallurgy on its regular staff (R. 910-911). It only hired consultants from time to time for a particular problem (*Ibid.*). "That is the way we operate. We hire technicians, we hire attorneys, we hire any particular specialist we need" (*Ibid.*). As petitioners' brief states, they "were distributors and agents in [vanadium oxide and ferrovanadium] and, after a time, in other alloy metals" (Pet. Br., pp. 5-6). The investment made by Continental in this business was minimal (R. 932, 1211-1215).

Instead, as the uncontradicted evidence shows, petitioners sought during the war boom and shortage (1) to buy vana-

dium oxide and sell it for a profit, (2) to buy vanadium oxide, induce others to process it into ferrovanadium with their own capital and facilities, and then sell the product, and (3) to buy vanadium oxide, repackage it and sell it under the trade name "Van-Ex" at a price greater than that permitted by the Office of Price Administration. These were petitioners' activities until 1944.

Then, the war shortage over and the demand gone, petitioners lost interest in vanadium and thereafter traded in it only sporadically (Ex. 119, R. 2212, 1089).[6]

B. Respondent Vanadium Corporation of America

Vanadium Corporation of America—hereafter sometimes VCA—was organized in 1919 (R. 1965). As petitioners point out, it is a fully integrated miner, miller of vanadium oxide and manufacturer of ferrovanadium (Pet. Br., p. 13).

Since its organization, VCA has pioneered in the technical and commercial development of vanadium and has long been a recognized leader in vanadium, as well as a principal producer of many other ferro-alloys (R. 1689, 1824-1826).

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[6] During or after the period involved in this action Leir evidently engaged in a number of other enterprises concerned with a variety of products, in addition to Continental Ore Company and Continental Ore Corporation.

The record contains references to (1) Austro-American Aluminum Corporation, which dealt in alumina and aluminum; (2) the Borites Corporation, which dealt in a mineral known as barytes; (3) the Coal Export Corporation, which exported "coal derivatives, coal tar products"; (4) another corporation which dealt in phosphates used for agricultural purposes; (5) the Magnolithe Corporation, which "was interested in the introduction of magnesia products—for sugar mills, for instance"; (6) the International Ore and Fertilizer Corporation; (7) the Continental Lead and Zinc Corporation, which dealt in lead and zinc; (8) the Continental Aluminum Corporation, which dealt in aluminum; and (9) the International Asphalt Corporation, which dealt in asphalt products (R. 1097-1102).

VCA sells vanadium mainly in its finished product form of ferrovanadium, and most of its vanadium oxide has been utilized in this way (R. 8, Comp. par. 15 not denied; R. 1827). Its customers include the leading steel manufacturers in this country (R. 7, Comp. par. 13 not denied; Ex. 17, R. Vol. VIII 73-132, R. 124)—a business achieved by technical leadership in adapting vanadium to the needs of customers, extensive research, the employment of skilled technicians who go out in the field and instruct steel makers in the proper uses of vanadium, and sales efforts devoted to persuading steel users to specify vanadium steels (R. 1824-1826). Because of the technical cooperation and supervision its customers have come to expect, VCA has never attempted to market vanadium through brokers (R. 1966).

VCA had owned a few vanadium-bearing ore bodies in the Colorado Plateau as early as 1919 and an idle vanadium mill at Naturita, Colorado, acquired by foreclosure in 1932 (R. 1827; Ex. 6, R. 2069-2070, 115). Its position as a producer, however, has historically been attributable to its ownership of what was formerly the richest vanadium mine in the world, located atop the Andes Mountains in Peru (R. 1828-1831). Vanadium ore could there be mined, and the ores milled into vanadium concentrate for refining, much less expensively than on the Plateau (R. 1829, 1923).

VCA did not commence raw material development in the United States until late in 1939, when imminent war in Europe threatened to isolate the Peruvian deposits and make its supply situation acute (R. 1826, 1956). VCA then undertook to rehabilitate the old plant it owned at Naturita and began operations there in 1940 (Ex. 6, R. 2069-2071, 115; R. 1918). In 1941 the Government urged VCA to increase its production from an annual rate of 2,700,000 to 4,000,000 pounds of vanadium by the end of 1942; by 1942 it had begun its operation of a Government-built plant in Monticello, Utah (Ex. V-2-O, R. 1837-1839).

Thus VCA, unlike petitioners, was in the vanadium business on a permanent basis and as a result of a large investment and sustained research and development (Ex. 6, R. 2069-2071, 115; R. 1689, 1824-1825). Indisputably it was a leading company. There is no question but that about 1938, when Leir arrived in this country, VCA and the Union Carbide group produced substantially all the ferrovanadium sold in the United States (Ex. V-2-M, R. 2556-2557, 1727). But insofar as supplies of ore and oxide were concerned there were forty or fifty other mining groups competing on the Plateau, and one of them had "far more ore than the Vanadium Corporation did" (R. 390, 509). And it is also undisputed—indeed it is conceded by petitioners' chief witness who recognized that VCA "had a strong, a long experience in marketing" (R. 505)—that VCA and the Union Carbide group had long been bitter competitors on the Plateau for such vanadium business as existed (R. 491, 504-505, 509, 1674-1675, 1680-1681).

C. The Union Carbide Respondents

Respondent Union Carbide Corporation (known as Union Carbide and Carbon Corporation when the action was commenced), during the period covered by the complaint, was the parent of a group of companies engaged in the mining, milling and sale of vanadium ores, vanadium oxide and ferrovanadium, as well as other ferro-alloys (R. 153, 164-166; Ex. 6, 2070-2071, 115).

Respondent United States Vanadium Corporation (USV), a wholly-owned subsidiary of Union Carbide, operated a mill for the processing of vanadium ores at Rifle, Colorado, from 1927 to 1932 (Ex. 6, R. 2070, 115). In 1932 the mill was shut down and sometime later dismantled (*Ibid.*). In 1936, USV erected another oxide mill at Uravan, Colorado, and, in 1942, another at Rifle, Colorado (*Ibid.*). It con-

tinued as a subsidiary until after the complaint was filed and was then merged into Union Carbide.

Three other Union Carbide subsidiaries were named in the complaint but were never served: Electro Metallurgical Company (Electromet or EM), which made ferrovanadium from vanadium oxide until its dissolution on January 5, 1949; Electro Metallurgical Sales Corporation (Electromet Sales or EMS), which sold vanadium products until its merger into the parent on March 14, 1949; and Electro Metallurgical Company of Canada (Electromet of Canada), a Canadian corporation, which sold ferrovanadium and vanadium oxide.

4. *The Core of Petitioners' Complaint*

The complaint charges violations of Sections 1 and 2 of the Sherman Act by reason of the same contracts, combination, conspiracy and monopoly alleged in the Government information, the trial of which resulted in respondents' acquittal (R. 13-16, 22; *supra*, p. 3 note). As already pointed out, the sufficiency of petitioners' evidence in support of these charges is not the question now before the Court (*supra*, p. 5).

More to the point here is petitioners' own claim of injury "by reason of" such assumed violations. They claim they were one of the "independent producers of ferrovanadium and vanadium oxide" who were "eliminated from the industry" as "one of the direct effects proximately caused by the monopolistic practices" alleged. Their complaint describes their four separate alleged ventures in the vanadium field (R. 16-21, pars. 30, 32-38; see also R. 23-24, par. 44-45). It was these ventures which petitioners had to prove at the trial were in fact frustrated by respondents' allegedly unlawful acts.

These ventures cover a period of about six years—from July 1, 1938, when Leir's Luxembourg corporation entered into a contract with Apex Smelting Company in this country, until sometime in 1944, when petitioners allege "Continental was forced to leave the vanadium industry altogether" (R. 17, par. 32; R. 21, par. 39). And through 1942, or during most of that six-year period, as they now point out in their brief, petitioners' vanadium sales grew (Pet. Br., p. 64). It was in 1943, the year of wartime scarcity and controls, that petitioners claim their business "suffered a severe decline" (*Ibid.*).

5. *Petitioners' Four Ventures in the Vanadium Business*

A. The Apex Contract Period

This period was the longest of petitioners' six-year connection with the vanadium business. According to the complaint, it ran from July 1938 to the spring of 1942 (R. 17-18, pars. 32-33). During this period petitioners' sales grew as vanadium enjoyed its early war boom (Pet. Br., p. 64).

En route to this country in 1938, Leir discussed with a shipboard acquaintance "the idea of going into the ferro-alloy business in general, including ferro-vanadium" (R. 1048-1049). He told him of a French process in which vanadium oxide was blended with other ingredients, mainly small pieces of aluminum, and then put in a crucible to be ignited with a small charge of magnesium (R. 792, 1049). The acquaintance thought Leir should see Apex Smelting Company in Chicago "because [they] were makers of aluminum, and aluminum was a part of our process" (R. 1049). That was the genesis of the Apex arrangement.

Leir conducted the negotiations which led to a contract dated July 1, 1938. The arrangement certainly was unusual. The parties were Apex and Societe D'Electro-Chimie de

Brignoud, a French corporation sometimes known as Fredet-Kuhlman (Ex. 117, R. 2190-2198, 1050; R. 1042). Contrary to the allegations of the complaint, neither Leir nor his Luxembourg corporation (Societe Anonyme Des Minerais) was a party to the contract (*Ibid.*; R. 17, par. 32). In brief, Brignoud was to sell its "secret process" to Apex in the United States and Canada, and Apex was to set up a separate department to make steel alloys. The profits were to be shared, but one-half of Brignoud's share was destined for the Leir's Luxembourg corporation; in December 1940 this interest was transferred to Continental (Ex. 117, R. 2198-2201, 1050; R. 1058). Six months later Continental reduced its share of the profits in exchange for appointment as Apex's exclusive sales agent at a 2½ per-cent commission (Ex. 117, R. 2187-2189, 1050; R. 1059, 1234).

There were obvious hazards in the arrangement. Apex had never made ferrovanadium; it was to be, as Leir said, "a new business for them" (R. 800-801, 1060-1061). Apex was to supply all the financing for the venture (R. 1115)—but nothing stipulated how much. Petitioners supplied no capital, but were to procure raw materials for Apex (R. 1115-1117).[7] And Apex, to produce a new product in its Chicago plant with its own employees, had to rely on Brignoud in France for the process and the necessary technical information (R. 910-911, 1293).

Over two years later—in August or September 1940—Apex finally produced its first ferrovanadium (R. 1062, 1124). In the interim, Continental, which was to supply the

[7] Under the Leir's Luxembourg corporation's "joint venture" with the French corporation, Leir had procured the raw materials —from South America, South Africa, Portugal and Burma—and had handled the sales, while the French company did the actual production (R. 789). But in that venture, unlike the Apex arrangement, the financing had been "fifty-fifty" (*Ibid.*).

raw materials for Apex's manufacturing operation, had a steady source of supply of vanadium oxide (R. 1124-1125). But the oxide was resold, mostly in foreign trade (R. 1125-1127, 1233-1234). These export resales stopped in July 1940, Leir admitted, because of the export ban (R. 1234). Continental nonetheless continued to sell large quantities of oxide to others than Apex through 1940 (Ex. U-5-X, R. Vol. IX 591-599, 1236-1237).

A little more than a year later Apex wanted to discontinue manufacturing operations in the face of continuing losses. Whatever promise the participants may have seen in the Apex arrangement in 1938, the record abounds with uncontradicted evidence of the true reasons for its frustration —reasons in no way connected with respondents. All of these reasons are specified in the contemporaneous correspondence between Apex and petitioners themselves.

In the first place, the venture was admittedly inadequately financed. Petitioners, who had no obligation to invest anything, wanted Apex to invest more. In February 1942, Leir wrote Apex a long letter, complaining bitterly that Apex had "treated the Ferro Department as a stepchild from the very beginning" and that the department "has never had the necessary equipment" (Ex. V-2-A, R. Vol. IX 603-608, 1176). He listed a series of conversations about a "new plant" which never materialized (*Ibid.*). At the trial, when asked if this fairly stated the situation, Leir replied he had written "an excellent letter" (R. 1185). Apex readily agreed that its investment had been "greatly inadequate for a sound and efficient business" (Ex. V-2-C, R. 2523, 1194).

There had also been persistent technical difficulties. Apex received little advice or assistance from the French company which owned the process, primarily because of the

outbreak of the war before Apex started production. Apex was forced to rely on its own experimentation and the results were faulty quality and considerable delay (Ex. V-2-B, R. 1188-1189, 1187; R. 1293-1294, 1349-1351). Not until late in 1941 had production difficulties been completely solved (R. 1351).

Moreover, Apex had difficulty finding in this country aluminum with a low copper content, essential to the operation (R. 873, 1217). It had anticipated using aluminum it produced from scrap aluminum, but it later found it necessary to go to a high purity primary aluminum which was difficult to get under wartime priorities and more expensive under price controls (R. 1280-1281; Ex. V-2-A, R. Vol. IX 603-608, R. 1176; Ex. V-2-B, R. 1189-1190, 1187).

Then in late October 1941—a few months after its first production of ferrovanadium—came a fire in the Apex ferro department which forced a shutdown of operations and prompted Apex to notify Continental of its wish to terminate ferro-alloy manufacture (R. 669, 1154, 1281; Ex. V-1-S, R. 1155-1157, 1154).

The fire was followed, even before production was resumed, by labor trouble related to the technical hazards of vanadium fumes and dust (R. 1283). On January 13, 1942 Apex wrote that it hoped "to get into production on Ferro Alloy this week, although we are having some difficulty with the labor, as most of them refuse to go to work in that Department. As you know, we have been trying to secure the proper respirators, but somehow or other, we have never been able to get any that keep the dust from getting into the men's throats and nostrils" (Ex. V-2-G, R. 2529, 1291). "It so happens," Apex reported a few days later, "that our men are now organizing, and the men that we have had in the Ferro Department refuse to go back into

it, as they claim that it is injurious to their health" (Ex. V-2-G, R. 2528, 1291).

Moreover, as an Apex officer testified, there had been "minor aggravations throughout the whole period of operation," as well as "lack of profit" (R. 1290). The ferro department "had been taking an awful lot of our time, too much a proportion of our time commensurate with the return to the company. In other words, accounting for a very small percentage of our sales in our operation, yet we were devoting an awful lot of executive time to it" (R. 1362).

Clearly Apex had been plagued in its attempt to finance a new department and make a product it had never made before. The basic contract gave it the right to terminate because of the losses it had sustained (R. 1191, 1295; Ex. 117, R. 2182-2201, 1050). Clearly too Apex had another, and even more compelling, reason to cancel the arrangement. Whatever attraction a new venture may have had in June 1938, the situation had changed by late 1941. Apex needed "space for production of aluminum, which was our principal business, and at that time was a very critical war material, the most critical" (R. 1291). The space "was much more valuable to us for aluminum operations than for ferro-alloy operations" (R. 1362).

After the October 1941 fire, Apex wrote Leir (Ex. V-1-S, R. 1155, 1154):

> "As our aluminum department is so vital a part of the defense program, and as new problems on which decisions must be made are coming up practically all of the time, we have decided that we must concentrate all of our efforts and available space in this department, and must discontinue anything that would interfere with its operation."

If Leir thought he "would be materially affected by our discontinuance of operations," Apex added, it "could possibly continue operations" until the end of the year to fill existing orders for which it had sufficient inventory on hand (*Id.* at 1156-1157). But it thought suppliers of vanadium oxide should be notified to discontinue shipments (*Id.* at 1157).[5]

Leir went to Chicago and persuaded Apex to continue (R. 1157-1158, 1171)—for how long does not appear. But in late January 1942, only a few months later, faced with increasing difficulty finding men to work in its ferro department because of its "hazardous nature" as well as continued losses, Apex wired Continental (R. 1283; Ex. V-1-Y, R. 2519, 1173):

> ". . . we are compelled to advise you that we are forced to discontinue this department. Will do our utmost to fill present orders subject to approval from Washington."

On February 13, 1942, Apex wired, "Cannot see our way to continue production ferro department beyond March 10th" (Ex. V-1-Z, R. Vol. IX, 602, 1174). The next day it notified suppliers to stop shipments of oxide (R. 1284).

On February 16, 1942, Leir protested Apex's decision at length (Ex. V-2-A, R. Vol. IX, 603-608, 1176). He pointed out that ferrovanadium was also an essential war item, listed Apex's alleged past shortcomings and offered to increase Apex's participation in profits: if Apex insisted on termination, however, Leir was ready to discuss it but de-

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[5] Apex's letter reported it had received a notice of shipment from Nisley and Wilson (Ex. V-1-S, R. 1156, 1154).

Nisley, a witness for petitioners, testified he had been shipping to Apex and recalled that it was unable to take more because of the fire (R. 669).

manded a continuation for six months (*Ibid.*). Not hearing from Apex, Leir a week later threatened "steps to safeguard our interest" (Ex. V-1-W, R. 1168-1170).

To avoid further dispute with Leir, Apex agreed to a short extension of vanadium production (R. 1171, 1343). It operated its ferro department and produced ferrovanadium until April 1, 1942, and it produced Van-Ex—another vanadium product discussed below (pp. 20-23, 37-39)—at cost until July 1, 1942 (R. 1173). Apex's supplies of vanadium oxide and Van-Ex were shipped against orders it or Continental obtained (R. 1288). On final termination Apex offered its entire equipment to Continental, but Continental declined (R. 1360-1361; Ex. 122, R. 2215-2216, 2221, 1096; Ex. V-2-F, R. Vol. IX, 608-610, 1288). Apex then offered it to VCA (Ex. 130, R. 2225-2228, 1241; Ex. V-2-H, R. 2530-2532, 1359). Eventually VCA acquired Apex's supply of magnesite, a lining used for its crucibles, and nothing else (R. 1286-1287, 1361). Leir tried unsuccessfully to sell the remaining equipment for Apex, but Apex in 1943 finally abandoned the equipment (R. 1289, 1337-1338).

Thus ended petitioners' four years with Apex—the most extended and sustained of their four ventures in the vanadium business.

B. The Van-Ex Venture

Next in point of time, but overlapping somewhat the Apex period, came petitioners' efforts to promote a product called Van-Ex. It had started during the Apex period and continued at rented premises on Long Island, New York, according to the complaint, from August 1942 until sometime in 1944 (R. 18, par. 34).

Leir proposed Van-Ex to Apex on November 1, 1941 when, after the fire in its ferro department, he rushed to

Chicago to persuade Apex to continue ferrovanadium operations (R. 1158; *supra*, p. 19). Apex agreed to start experimentation with the new product (R. 1281-1282). Van-Ex, however, eventually turned out to be vanadium oxide, renamed and repackaged so that it could be sold at above-ceiling prices.

"The idea of making Van-Ex," Leir testified, "had been in our heads long before" the November 1 meeting (R. 1158). Within the month, however, he had been advised by a chemist, whom he accepted as an expert in the field, that "mixtures of vanadium with aluminum would lead necessarily to explosions" (Ex. V-1-T, par. 9, R. 2515-2516, 1163). He thought it likely that he would suggest reducing the amount of aluminum, but cautioned Apex, "until you have such new information from us, please do not prepare any mixtures for Van-Ex" (Ex. V-1-T, R. 2517, 1163). A week later, on December 3, 1941, he repeated that no Van-Ex should be prepared until receipt of further information about the aluminum content (Ex. V-1-U, R. 2518, 1164). Finally, it was decided not to use aluminum at all (R. 1166).

Continental also considered adding a little fluorspar to the vanadium oxide. Fluorspar did not provide heat but acted only as a flux (R. 844). But Leir thought it "would make the whole mixture a little more complicated for the one who analyzes it and who wants to imitate it" (Ex. V-1-B, R. 1161, 1005).

The first shipments of Van-Ex were evidently in March 1942 (Ex. 79, R. 2169-2173, 797). Later that month Apex reported that the first shipment had contained 2% fluorspar, "which could not be noticed," and thereafter it had been shipping "just the plain" oxide (Ex. V-1-X, R. 1171-1172).

Thus Van-Ex turned out to be vanadium oxide, without material additions. Apex regarded Van-Ex production as

a "straight packaging" of vanadium oxide (R. 1282).[9] Leir himself conceded, "At certain times straight vanadium oxide was shipped" as Van-Ex (R. 1172). Nothing in the record proves anything else.

It was offered to the steel trade as a substitute for ferrovanadium (R. 842). "Some of the companies," Continental's vice-president testified, "used plain vanadium oxide if they could get it to throw into their furnaces, not regarding or not caring too much in that war period whether they had a good recovery out of it, or whether it was economical or not" (R. 891).

Shortly after the first shipments of Van-Ex, the O.P.A. in May 1942 established the ceiling price for vanadium oxide at $1.10 a pound (R. 909; Ex. V-2-M, R. 2560, 1727). Continental, however, sold its Van-Ex at a price which brought it about $1.34 a pound of vanadium oxide—or 24 cents more than the ceiling price (R. 909-910). As Apex's officer testified, "We merely bought something and sold it at a higher price" (R. 1347-1348).

Apex continued to package Van-Ex for Continental at cost until July 1, 1942 (Ex. 122, R. 2215-2221, 1096; R. 871, 1071, 1173). After that the North Continent Mines (Shattuck) oxide shipments went direct to Continental, which had arranged to repack the material itself in "a little shop in Long Island" (Ex. U-3-Q, R. 2446-2448, 911; R. 843).

Petitioners made sales of Van-Ex through 1942 and early 1943, one of their customers being Atlas Steels Limited, a Canadian company (Ex. 79, R. 2169-2174, 797). Petitioners

[9] In February 1942 Apex cancelled an order for steel drums "when we found that Van-Ex was changed to a different business . . . as there is no use in having cans for anything we are not going to produce" (Ex. V-1-V, R. 1166-1167).

offered no proof as to how long the Van-Ex venture actually continued. They were not even sure when the Long Island plant was closed (R. 989).[10] The record indicates that the Van-Ex venture was virtually over by May 1943 at the latest. For instance, petitioners now point out that they needed a small pebble mill to make Van Ex (Pet. Br., p. 49). But the record shows that the pebble mill had been sold in May 1943 (R. 1211-1212).

By that time, moreover, Continental had launched a new venture—an arrangement, similar to some extent to the Apex arrangement, for the manufacture of ferrovanadium by Climax Molybdenum Company (*infra*, pp. 24-27, 40). The record shows subsequent shipments of ferrovanadium (Ex. 79, R. 2169-2174, 797). It shows only two more shipments of Van-Ex, one to Atlas in May 1944 and another to a Swiss concern in May 1946 (*Ibid.*; Ex. U-5-E, R. 2467, 991). So far as Continental's vice-president knew, this last shipment could also have been just plain vanadium oxide (R. 991-992).

The vanadium oxide shortage had eased by the end of 1943 (R. 269; Ex. U-2-C, R. 471-473). Then certainly there was no longer any demand for the over-priced Van-Ex substitute. As Continental's vice-president later pointed out, when refusing an offer of oxide for resale, its customers were "not too keen on the change-over from Ferro-vanadium to fused Vanadium Oxide although they had used the oxide during the war" (Ex. U-3-J, R. Vol. IX 560-561, 889).

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[10] Continental's vice-president testified (R. 989):

"Q. Well when did you close the Long Island plant?
"A. I couldn't tell you any more than that.
"Q. Could you tell me the year?
"A. No, I don't know the year.
"Q. '44? '45?
"A. I believe it was '44."

C. The "Pending Negotiations" With Climax Molybdenum Corporation

In June 1943, according to the complaint, there were "pending negotiations for an arrangement with Climax Molybdenum Corporation to manufacture vanadium for Continental's account" (R. 21, par. 38).

We assume here *arguendo*, as the Court of Appeals assumed, that all the evidence offered by petitioners with respect to this venture was admissible. But the record is nonetheless barren of any evidence of the nature of the "pending negotiations" with Climax (see R. 817, 829).

The record does show that, in February 1943, Continental entered into a contract with Climax under which it agreed to ship to Climax 20,000 pounds of vanadium oxide, together with the necessary low copper aluminum for conversion, and Climax was to convert it into ferrovanadium for a fee (Ex. 111, R. Vol. VIII 182-183, 1014).[11]

The next month Continental requested the necessary oxide from Metals Reserve Company, which had to tell it that none was available (Ex. U-4-C, R. Vol. IX 567-568, R. 940-941). But in April 1943 Continental was able to get the 20,000 pounds of oxide called for by the Climax contract—half from Electromet and half from Metals Reserve Company—although for some time it continued to complain to Electromet about paying the regular $1.15 price for spot purchases of 500 pounds or more (Ex. U-4-D, R. Vol. IX 569, R. 942; Ex. U-4-E, R. Vol. IX 570, R. 943-944; Ex. U-4-F, R. Vol. IX 571-572, 945-946; Ex. U-4-G, R. Vol. IX 573-574, R. 946-947; Ex. U-4-H, R. 2451, R. 947-948; Ex. U-4-I, R. Vol. IX 575, R. 949-950; Ex. U-4-J, R. Vol. IX

[11] In January 1943, Leir had approached Apex with a new proposal for the manufacture of ferrovanadium (Ex. V-2-C, R. 2524-2526, R. 1194-1196). Apex was not interested (*Id.* at R. 2523-2524, R. 1196-1197).

576, R. 951; Ex. U-4-K, R. Vol. IX 577-578, R. 951-953; Ex. U-4-L, R. Vol. IX 579, R. 953-954; Ex. U-4-M, R. Vol. IX 580, R. 955; Ex. U-4-N, R. Vol. IX 581, R. 957; Ex. U-4-O, R. Vol. IX 582, R. 958). Electromet on June 1, 1943 accepted Continental's check for a lesser amount to terminate the price dispute (Ex. U-4-Q, R. Vol. IX 584, R. 960-961).

Continental, as its vice-president conceded, was able to comply with the terms of its Climax contract (R. 1027-1028). So far as the record shows, Climax also performed.

Petitioners recognize the absence of the proof the Court of Appeals could not find. They therefore now rely on two chance comments in the testimony to take the place of the evidence they should have produced to support the specific allegations of their complaint.

First, they emphasize testimony that petitioners "had likewise lost Climax Corporation, who had done the same thing for us [as Apex], and did not continue because of interference by the defendants with Climax" (R. 978). But this was a patently argumentative conclusion of Continental's vice-president and cannot substitute for evidence of the existence and nature of the negotiations. If such negotiations did occur, they were peculiarly within petitioners' knowledge and should have been properly proved.

Second, they rely on testimony given by the same witness in connection with a letter to Electromet in May 1943—in the course of the price dispute over the April 1943 shipment—expressing a willingness to sign a contract for requirements for the rest of the year (Ex. U-4-M, R. Vol. IX 580, R. 955).

Significantly, there was no claim of any similar offer to VCA. What does not appear in petitioners' summary of the testimony (Br., pp. 106-107), is that Continental had

insisted the price should be $1.10 a pound rather than $1.15, and that Electromet had explained that $1.15 was the regular price on spot, as distinguished from contract, purchases (Ex. U-4-J, R. Vol. IX 576, R. 951; Ex. U-4-L, R. Vol. IX 579, R. 953-954). Continental's answer was an ingenious bargain proposal (Ex. U-4-M, R. Vol. IX 580, R. 955-956):

> "... we believe that we can overcome this difficulty in price resulting from the difference between spot and contract sales. We are perfectly willing to sign a contract with you for our requirements until the end of the year ...
>
> "This contract, at the usual price of $1.10 . . . could then be considered as applying to the lot shipped in April."

Continental did not wait for a reply. Leir had his bank forward a check against the invoice, computed at the $1.10 rate (Ex. U-4-O, R. Vol. IX 582, R. 958). Significantly, too, Continental did not repeat its offer of a requirements contract when Electromet accepted the check, at the $1.10 rate, as payment in full to end the dispute (Ex. U-4-Q, R. Vol. IX 584, R. 960-961).[12] But nothing in the correspondence suggests any negotiations with Climax or the anticipated use of the additional oxide—requested only while bargaining to beat down the price of the prior shipment—for any continued relations with Climax.

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[12] The offer to enter into the requirements contract with Electromet was never rejected, despite petitioners' claim (Pet. Br., p. 59). Exhibit U-4-N (R. Vol. IX 581, R. 957)—which petitioners cite (*Ibid.*)—was admittedly an answer to an earlier letter (R. 957-958).

Indeed, before any reply was received, Continental proposed to Electromet that it would put at its disposal a like amount of oxide out of the production of Nisley & Wilson—"for which we hold a contract with Metals Reserve at $1.10 and which has been allocated to us"—"so that the entire transaction can be written off" (Ex. U-4-P, R. Vol. IX 583, R. 959-960).

Much later petitioners' counsel asked the witness whether he recalled "for which of these contracts"—the Climax contract (for which petitioners had previously obtained their oxide) or the Imperial contract (which was not to be entered into until seven months later)—"you made that demand for the requirement contract" (R. 1018). The witness, erroneously placing the demand in June 1943, could only guess, "June of '43? That would have been probably for Climax I would say" (R. 1018).

But petitioners never offered evidence of any subsequent "pending negotiations" with Climax, in June 1943 or any other time. Nothing in the record even suggests that Continental ever approached Climax again, much less any details of any negotiations. In short, nothing supports any inference that there were ever any negotiations with Climax that were not fully consummated.

D. The Imperial Paper and Color Arrangement

Finally, petitioners' complaint alleged that in "the spring of 1944, Continental entered into a contract with Imperial Paper and Color Corporation . . . whereby Imperial agreed to process ferro-vanadium and vanadium oxide and Continental agreed to act as sales agent for its entire output, in addition to undertaking to secure the necessary raw materials" (R. 19, par. 35).

The contract was dated January 4, 1944 (Ex. 110, R. 2175-2178, 1014). As in the Apex arrangement, Imperial was to install the equipment necessary to manufacture vanadium products, "including but not limited to vanadium oxide and ferro vanadium" (Ex. 110, R. 2175-2177, pars. 1, 4, 1015). But it was agreed that the contract was "contingent upon the decision of Imperial to manufacture vanadium from other raw materials than chromite and/or to make ferrovanadium" (R. 2178, par. 8). If Imperial decided

"not to enter this new field of production," the agreement was to be "null and void" (*Ibid.*). Continental agreed to act as Imperial's exclusive sales agent on a commission basis and "to cooperate" with Imperial in the potential manufacture of its products (R. 2175). The only additional engagement petitioners undertook was (R. 2175-2176):

> "... to consult with Imperial with reference to the availability of raw material, the metallurgical or chemical processes to be employed, and * * * report to Imperial all changes in market conditions and the development of new sources of supply for raw material etc. both in the domestic and foreign markets."

Thus the Imperial arrangement was not one for the procurement of vanadium oxide as such but of "raw materials," e.g., ores, etc., from which Imperial could manufacture vanadium oxide to be sold or converted by it into ferrovanadium. Imperial, however, never installed the necessary equipment, never produced any ferrovanadium (or any vanadium oxide other than its chromite by-product), and the record permits no dispute about the reasons for its decision. A war-produced labor shortage made operations impossible until at least May 1945 (Ex. U-3-K, R. Vol. IX 561-562, R. 892; Ex. U-3-N, R. Vol. IX 564, R. 899-900; Ex. 114, R. Vol. VIII 185-186, R. 1022-1023). By then the demand for ferrovanadium and vanadium oxide had declined sharply (R. 1530-1531, 1680-1682; Ex. 76, R. Vol. VIII 174-175, R. 762-763; Ex. U-P, R. 407-414; Ex. U-2-B, R. 471-473; Ex. U-2-C, R. 473-476; Ex. U-2-Z, R. 738; Ex. U-3-A, R. 739; Ex. U-3-B, R. 740-741). Imperial had not perfected its process (U-3-N, R. Vol. IX 564, R. 899-900; Ex. 115, R. 2179-2182, 1024).

In December 1944, almost a year after the contract had been executed, Continental asked Imperial for a letter which it could show to Metals Reserve (Ex. U-3-N, R. Vol.

IX 564, R. 899-900). Imperial was to explain that "things have been held up because of the present manpower shortage," but that it intended, as soon as the labor situation changed, "to proceed with the vanadium production on a substantial scale" (Ex. U-3-X, R. 899-900). Imperial declined as it was still unwilling to make any commitment; it feared the letter "might be construed as a representation that would involve an obligation that we do not care to assume" (Ex. 114, R. Vol. VIII 185-186, R. 1022-1023).

As far as the record shows, Imperial never assumed any obligation under the contract with Continental. Petitioners' assertion that as late as 1946 they were still attempting "to manufacture ferrovanadium on a permanent basis with Imperial" (Pet. Br., p. 65) finds no support in the record. There is no evidence at all about 1946 and the brief interchange of 1947 correspondence put in evidence by respondent Union Carbide (Ex. U-3-J, R. Vol. IX 558-561, R. 889) shows Imperial pursuing a reluctant Continental to help find a customer for some vanadium oxide Imperial wished to dispose of.

On this record only one thing is clear: as the Court said below, "The arrangement never got started" (R. 2582).

6. *Petitioners' Claimed Elimination From the Vanadium Industry*

Petitioners' burden was to prove that their four ventures in the vanadium business terminated or failed as a result of acts forbidden by the antitrust laws. In an attempt to sustain that burden, petitioners rely primarily on thirteen "requests for vanadium oxide from respondents" between July 1939 and November 1943 (Pet. Br., p. 59, also pp. 40-43, 51-52, 56-58). They also complain that respondents interfered with their relations with Apex in 1942 and with

Climax and a Canadian customer in 1943 (Pet. Br., pp. 47-48, 52-56). Each of these so-called requests for customers and interferences is discussed in this section, in connection with the period or venture to which petitioners claim it relates.

Petitioners also claim that respondents "interfered with independent oxide suppliers" (Pet. Br., pp. 44-46, 60-63). We submit these claims are immaterial as well as unfounded since the uncontradicted record shows no inadequacy of supplies or any effect on any of petitioners' ventures. But since VCA is charged with the alleged interference with Blanding Mines, and perhaps with some participation in the claimed thwarting of petitioners' plan to erect a ferro-vanadium plant on the Colorado Plateau—a subject raised here for the first time in this litigation—these too are discussed so that there may be no doubt with respect to them (*infra*, pp. 35-37, 43).

A. Apex

Petitioners' complaint alleged that "Apex was unable to operate profitably for the specific reason that it was unable to obtain vanadic acid, and was thus compelled to cease manufacture of ferro-vanadium" (R. 18, par. 33).[13] Their brief suggests "various actions," some "frantically" made and another "desperate," to obtain the oxide to allow Apex to remain in business. But the indisputable evidence—from Apex and Leir himself, as well as the contemporaneous documents—is that Apex throughout its operations had all the oxide it needed and a plentiful additional supply was available to it.

From July 1938 to August or September 1940, before Apex started manufacture, Apex had no immediate need for

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[13] Vanadic acid and vanadium oxide are used interchangeably (R. 1063-1064).

oxide. Stockpiling then for future operations struck Leir as "irrational," although "we could have done it" (R. 1233). Supplies were available, but the export demand perhaps too attractive. Until July 1940, when the embargo ban became effective, Leir simply exported the bulk of the substantial quantities of vanadium he purchased (R. 1233-1234). Four of the thirteen "requests for vanadium oxide from respondents," on which petitioners rely, predated the export embargo and Apex's first production and fell in the period in which Leir was reselling oxide to others. Manifestly they could not have affected Apex or denied it supplies for its operations.

When Apex started manufacture in August or September 1940, it was being supplied by two different sources (R. 1124-1125). Even then there was no decision to stockpile. As Leir put it, they could keep the raw material for Apex's use or "ship it in other directions" (R. 1125). In August 1940 Apex expected 20,000 pounds from one of these suppliers during the next two months (Ex. V-1-J, R. 2498-2500, 1127). Leir recommended the 20,000 pounds be resold "because there is a production of about 10,000 lbs. every month from Rifle and two new productions which will open very shortly in Arizona and Los Angeles" (*Id.* at 2499). Perhaps he was affected by the three per cent commission which he thought he "definitely had a right to," although he later agreed to return it to Apex (R. 1129, 1131-1132). At the trial Leir conceded the resale was "an error in judgment" (R. 1130-1131).

At that time, Leir said at the trial, he "was not concerned" about getting regular supplies of vanadium oxide (R. 1237). Perhaps too he had to accommodate himself to Apex's policy against stockpiling and long term contracts —to limit its purchases "approximately to what we had

definitely sold for the future" (R. 1275, 1353). With Leir's confidence and Apex's policy, Continental continued to resell oxide to other customers—over 28,000 pounds between September and December 1940 and another 1,800 pounds in early 1941 (Ex. U-5-X, R. Vol. IX 591-601, R. 1236-1237). Again Electromet's so-called refusal of oxide in October 1940—apparently a broad interpretation of an Electromet representative's statement when he was in Apex's office (Pet. Br., p. 59; Ex. 128, R. Vol. VIII 189-190, R. 1240)—could not have affected Apex's manufacturing operations.

Moreover, in the year that followed Apex's first production, it refused four separate opportunities to make commitments which would have provided it much greater supplies of oxide on a sustained basis—(1) from Blanding Mines, which was then supplying it with a lesser amount monthly, in the Fall of 1940 (Ex. V-2-I, R. 1698-1700; R. 1153, 1700); (2) from the Morrison mill in December 1940 (Ex. V-1-K, R. 2501, 1133; Ex. V-1-O, R. 1140-1142); (3) from the new operator of the Morrison mill in the Spring of 1941 (Ex. V-1-P, R. 1142-1145); and (4) from the National Vanadium Company in September 1941 (Ex. V-1-Q, R. 2507-2513, 1145; Ex. V-1-R, R. 2514-2515, 1150-1153).

Even these decisions—for which respondents are in no way responsible—are difficult to question. Throughout the period Apex had a regular supplier in Shattuck (North Continent Mines) which had "far more ore than the Vanadium Corporation did" (R. 509)—from which it received very substantial shipments (Ex. 118, R. 2210, 1066; Ex. V-1-S, R. 1154-1157; R. 1066-1068). It had other suppliers as well (*Ibid.*). And during the remainder of the Apex operation—including the January 1941-January 1942 period which petitioners now call the "critical period" (Pet. Br., p. 102)—only once did petitioners make a direct request for oxide of any respondent and then never followed up

when they received no answer.[14] The other so-called requests, all in June or July 1941, were either not for oxide or not to any of the respondents.[15]

"From October to December, 1941," according to their brief, "petitioners frantically attempted to obtain oxide" (Pet. Br., p. 102). But they did not request any from any respondent. Moreover, the record clearly shows, Apex had enough oxide to fill all outstanding orders in October 1941, when the fire in its ferro department brought about its notice to Leir that it wished to discontinue operations (Ex.

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[14] Petitioners produced a short letter to Electromet dated June 14, 1941, which was merely a request for an "offer" of an unspecified quantity of vanadic acid (Ex. 77, R. Vol. VIII 176, R. 776).

Electromet evidently could not find it in its files (R. 776), and no answer was produced. Nor do petitioners—although now said to have been desperate (Pet. Br., p. 103)—appear to have done anything to follow up when no response was received.

[15] The two other requests in June 1941 were that petitioners be allowed to convert VCA and Electromet oxide for their account—not that they be sold oxide (Ex. 77, R. Vol. VIII 176, R. 776; Ex. 132, R. 2261-2263, 1245). VCA, of course, had ample facilities for converting its own oxide and replied that it was not interested (Ex. 132, R. 2261-2263, 1245; R. 1971). Electromet replied that it was "at the moment able to smelt all the vanadic acid which we have available" (Ex. 77, R. Vol. VIII 176, R. 776). Certainly these requests do not suggest that Apex did not have sufficient oxide for its own manufacturing needs.

On July 16, 1941, petitioners claim, they asked for oxide from VCA and Electromet through the Vanadium Section of OPM (Pet. Br., p. 59). Their request was not offered in evidence and nothing in the record suggests any reason for it. For all that appears, the request was not even for Apex. OPM's reply stated simply that it had been informed by VCA and USV "that they have no vanadic acid for disposal since they are themselves using all of the acid they produce either in their production of ferro-vanadium or to supply their own customers using vanadium for defense and essential purposes" (Ex. 132, R. 2265, 1245).

Nothing in the record suggests that the facts were not in all respects as stated to OPM. Indeed, Continental conceded that respondents did use their oxide in the manufacture of ferrovanadium for steel and that it was "not necessarily" good business for some one to sell oxide he produced if he needed it in his own manufacture of ferrovanadium (R. 869-870).

V-1-S, R. 1155-1157, 1154). Apex then pointed out that Shattuck had been shipping 12,000 to 18,000 pounds of oxide "to us every couple of weeks" (*Id.* at 1157). It even suggested that all suppliers, including Shattuck, be notified immediately to discontinue shipments until further notice (*Id.* at 1157). By the end of 1941 Apex had 45,827 pounds of oxide on hand; in the first half of 1942, when it resumed operations, it purchased another 82,892 pounds (Ex. 143, R. 1306-1307; Ex. 118, R. 2210, 1066).

In February 1942, having repeated its decision to discontinue ferrovanadium operations, Apex notified Shattuck (North Continent Mines) to discontinue shipments until further notice (Ex. V-2-E, R. 1284). It then had about 50,000 pounds of oxide on hand (R. 1331, 1342). This was enough to fill all existing orders (R. 1361). And Leir conceded that Apex at that time was able to get additional supplies (R. 1175).[16]

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[16] Leir had persuaded Apex to sign a letter he had written, dated December 13, 1941, to the Defense Plant Corporation for oxide from the Monticello plant to be erected (Pet. Br., pp. 102-103).

The letter claimed Apex's plant for the production of ferro-alloys had been built in 1930 and could not make use of all its production facilities "due to the lack of raw material" (Ex. 144, R. 2266, 1313). Of course, Apex had started ferro alloy production in 1940—not 1930—and had only recently solved its production difficulties (R. 1351). Moreover, Apex then had almost 50,000 pounds of oxide on hand and was not even in production because it was rebuilding the plant which had been destroyed in the fire (Ex. 143, R. 1306-1307; R. 1358). Clearly Apex then had no shortage of raw materials and, as its officer testified, the correspondence referred to some "future operations" and "distant date" (R. 1358).

By February 16, 1942, there may have been "assurances," as Leir argued to Apex, which would "facilitate our obtaining part of the new output" of the new Government Monticello plant (Ex. V-2-A, R. Vol. IX, 603, R. 1176; Pet. Br., 104-105). But Apex had already decided to discontinue operations. Raw materials never having been its problem, there was no reason to change its mind.

By mid-1942 all its obligations to Continental had been fulfilled and Apex was finished with the ferrovanadium business (*supra*, pp. 19-20). Continental arranged with North Continent Mines to take over the purchase of its production which had formerly gone to Apex (Ex. U-3 Q, R. 2446-2447; R. 911-915).

Perhaps Leir, sensing the results of Pearl Harbor, wanted Apex to accumulate oxide. But Apex itself—whose business is alleged to have terminated because of an inability to obtain oxide—clearly could get all it wanted.[17] There is not a shred of evidence that Apex or Continental lost a single sale because it could not get oxide. And at the trial, an Apex officer three times confirmed what was indisputable from the record—very simply, an inability to secure oxide "wasn't the reason for closing" the ferrovanadium business (R. 1287; see also R. 1290, 1361-1362).

Sensing the weakness of their claim of shortage of oxide, petitioners attempted to put the blame on VCA for Apex's decision to go out of the vanadium business (Pet. Br., pp. 47-48). This charge is as unfounded as the alleged oxide shortage. There is no question that an Apex vice-president in charge of sales first approached VCA and not vice versa. It was "the normal thing" for him "to contact somebody in reference to disposing of the equipment after we made a decision to go out of business" (R. 1286). He advised VCA of Apex's decision and that Apex had some equipment and a small stock of oxide on hand it would like to dispose of,

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[17] If there were "some short periods" when Apex did not have a sufficient supply of oxide coming in, it was concededly the result of its own policies (R. 1274-1277).

It would not stockpile—not even one month's supply (R. 1274-1275, 1277). It would not finance or help finance oxide mills and turned down several requests for such assistance from suppliers (R. 1275-1276). Its policy was not to enter into contracts to take a fixed quantity of oxide over an extended period, and it refused several requests for such contracts (R. 1276).

if VCA was interested (Ex. 62, R. Vol. VIII 163, R. 671). Apex was to supply further details and VCA a few weeks later, not having heard from Apex, followed up with a telephone call (Ex. 62, R. Vol. VIII 167, R. 671, 673). Apex then reported legal difficulties with Leir and its counsel's advice to make the most satisfactory arrangements it could with him (Ex. 62, R. Vol. VIII 167, R. 671, 673; Ex. V-1-W, R. 1167-1170; 1343).

Apex agreed to a short extension of operations (*supra*, p. 20). Then it offered Continental the opportunity to acquire its equipment (R. 1337). Continental did not buy it and could not even sell it for Apex, so that it had to be abandoned except for a supply of magnesite eventually sold to VCA (R. 1337). Clearly, neither these facts nor VCA's purchase of "very small quantities" of dioxidizing ingots sold by Apex (R. 1336-1337) afford any basis for an inference that Apex's decision to go out of the vanadium business was the result of "an agreement" with VCA, as petitioners assert (Pet. Br., p. 47).

No more support can be found for petitioners' claim that VCA "usurped" the Blanding Mine oxide production from Apex in early 1942 or for their insinuation that this was also in some way responsible for Apex's decision to discontinue operations (Pet. Br., pp. 34, 45-46).

In the first place, shipments from Blanding had stopped, as petitioners concede, in January 1941 (Pet. Br., p. 44)—or about a year before the Apex termination. Blanding had shut down its plant for certain improvements (R. 1703; Ex. 131, R. 2234-2235, 1242). But Blanding did not renew dealings with Apex when it resumed production in October 1941; Apex's price offer was "below other offers which we [Blanding] have received" (Ex. 131, R. 2235-2236, 1242).

Nor is there any basis for the inference that Blanding's inability to deal with Apex on January 9, 1942—even without regard to the fact that on January 14, 1942 it opened the door to future dealings with petitioners (Ex. 131, R. 2240-2241)—contributed to Apex's renewal on January 27, 1942 of its earlier decision to discontinue vanadium operations. Apex had made its reasons for discontinuing perfectly clear and they did not include the lack of Blanding or any other oxide suppliers (Ex. V-1-Y, R. 2519, 1173-1174). Indisputably Apex then had adequate supplies from Shattuck (North Continent Mines) and other suppliers with whom it had continuing current dealings—and even Leir admitted it could obtain additional supplies (*supra*, pp. 32-34).

B. Van-Ex

Here the complaint alleged that (1) Continental's business in Canada was effectively eliminated by respondents, and (2) "in 1944, Continental discontinued shipping from its Long Island location because the difficulty of securing raw materials rendered it commercially impossible to operate profitably" (R. 18, par. 34).

The Canadian issue is essentially a legal question and is discussed under Question 3. Worth noting here, however, is the basic inconsistency of petitioners' position. As the Court of Appeals pointed out (R. 2577):

> "It seems obvious that, if lack of supplies was really the cause of Continental's undoing with regard to Van-Ex, the loss of Atlas [a Canadian concern] as a customer would become irrelevant, for the absence of customers cannot hurt a seller who has nothing to sell. On the other hand, if the defection of Atlas was the cause of Van-Ex's demise, the alleged lack of supplies could have had no relevance, for an abundance of goods is of no use to a seller who lacks customers."

The entire record on Van-Ex is singularly sparse. But it is clear that petitioners' further claim that Van-Ex, like Apex, suffered from difficulty in securing raw materials, has nothing to support it.

The record does show that Apex, when it discontinued its Van-Ex packaging on July 1, 1942, transferred its oxide stocks and the North Continent Mines source to Continental (*supra*, p. 35). Shipments to Continental continued in 1942 and through April 1943 (Ex. 118, R. 2203, 1066). It also received 4,000 pounds from the Nisley & Wilson mill in late 1942 (Ex. U-3-W, R. 923-924). There is no suggestion that these supplies were inadequate.

In January 1943, Leir proposed a new ferrovanadium venture to Apex and the discontinuance of the Van-Ex business (*supra*, p. 24 note; Ex. V-2-C, R. 2524, 1194-1196). There was no question of any shortage of raw materials (R. 1196):

> "Q. Well, now, Mr. Leir, then in January of '43 you had assurance of ample supplies of vanadic acid, is that correct? A. Yes."

In April 1943 Continental obtained 20,000 pounds of oxide which it used for its February 1943 contract with Climax for the manufacture of ferrovanadium (*supra*, p. 24). In May 1943 it had a contract with Metals Reserve for at least 20,000 pounds of oxide out of Nisley & Wilson production (Ex. U-4-P, R. Vol. IX, 583, R. 959-960).

Petitioners never offered evidence which would clearly define the Van-Ex period, and the only inference is that they had lost interest by April or May 1943. The oxide Continental received in April 1943 went to Climax, not Van-Ex (*supra*, p. 24). If Continental "needed only a small pebble mill to make Van-Ex"—as petitioners now state (Pet. Br., p. 49)—the pebble mill was sold in May 1943 (*supra*, p. 23).

Its May 21, 1943 request for oxide from Electromet—its first request of any respondent in almost two years (Pet. Br., p. 59)—was evidently not for Van-Ex, if in fact it had any purpose other than as a palpable ploy in a price dispute (*supra*, pp. 25-26). In any event, petitioners' counsel at the trial suggested only that the requested oxide was for either Climax or Imperial—not Van-Ex—and Continental's vice-president guessed it would have been for Climax (*supra*, p. 27).

It is therefore unnecessary to answer in detail petitioners' varied disagreements with the Court of Appeals' disposition of the claim of oxide shortage during the Van-Ex period (Pet. Br., pp. 109-110). Whether or not the Nisley & Wilson mill was shut down from October 1942 to April 1943, as petitioners assert, is immaterial if there is no proof in the record that petitioners' inventory and its supplies from other sources were insufficient. For the same reason, it is immaterial that Metals Reserve Company in March 1943 "turned down petitioners' request for oxide" (Pet. Br., p. 109)—although petitioners in fairness might have added that the request was filled the very next month, half of the material coming from Electromet, and that the request was for Climax ferrovanadium and not Van-Ex (*supra*, p. 24).

In short, whatever Van-Ex was, however long it lasted and whatever the reasons for its disappearance—and petitioners' proof is obscure on all these points—there is nothing in the record to support petitioners' claim that Van-Ex was discontinued because of difficulty in securing raw materials (R. 18, par. 34).

C. Climax

The complaint alleged that "M. D. Arrouet, an official of one of the defendants"—subsequently identified as Elec-

tromet (R. 814)—in June 1943 "informed Continental that it should desist from attempting to conclude pending negotiations for an arrangement with Climax Molybdenum Corporation to manufacture vanadium for Continental's account" and "threatened that if Climax undertook the manufacture of ferro-vanadium for Continental, the defendants would enter the molybdenum industry as a reprisal against Climax" (R. 21, par. 38).

The simple answer is that the record contains nothing about these alleged pending negotiations (*supra*, pp. 24-27). Not one witness or a single piece of paper even suggests that the threats were ever carried out or that the reprisals were ever taken. Nor is there any evidence to support an inference that either Continental or Climax terminated the alleged pending negotiations—whatever they might have been—because of anything said or done by the Union Carbide employee.

As the Court of Appeals necessarily concluded, respondents "have thus failed to show any injury resulting from the alleged threats." Plainly, no jury could conclude that petitioners were injured in their business by the disruption of negotiations when it is never told what the negotiations were or anything about what is supposed to have happened to them.[18]

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[18] We leave to Union Carbide's brief the question whether Arrouet was authorized to act for it.

We submit, however, that he could not bind VCA. Moreover, petitioners' offer of proof nowhere suggests that VCA knew anything of any negotiations with Climax, cared anything about them, or had authorized any reprisals against Climax. Nor did the offer of proof represent that anything Union Carbide or any affiliate had threatened it might do or had done was in furtherance of any conspiracy with VCA (Pet. Br., pp. 52-54).

D. Imperial

Finally, petitioners' complaint alleged, with respect to the Imperial contract—"At the end of the year 1944, Imperial was compelled to abandon the contract . . . because of the inability of Imperial or Continental to secure vanadium oxide or vanadium-bearing ores" (R. 19, par. 35).

Petitioners then referred to vanadium-bearing ores as well as vanadium oxide. But Imperial patently had not been willing to make the necessary investment for an assured supply of ore (Ex. 114, R. Vol. VIII 185-186, R. 1022-1023). Nor is there any evidence that Continental had developed any taste for mining or milling on the Plateau. Indeed, all the assets of North Continent Mines were available until August 1944; Leir investigated the possibility but never made an offer (Ex. U-5-1, R. Vol. IX, 586-588; R. 1205, 1207-1208).

Petitioners now refer to vanadium oxide rather than vanadium-bearing ores (Pet. Br., 56-58, 108-109). They argue that petitioners' November 1943 "requests for supplies"—actually a request for an offer of 10,000 to 15,000 pounds a month "for a fixed length of time" (Ex. 42, R. Vol. VIII, 156, R. 271)—"were for the specific purpose of supplying Imperial" (Pet. Br., p. 108). But, despite the alleged refusals, Continental in January 1944 nonetheless proceeded to enter into its contract with Imperial (*supra*, pp. 27-29). Nor did petitioners ever make any subsequent request of VCA, despite its reply to the "request for supplies" on November 19, 1943—in which VCA had explained that, because of its present commitments, it was "not in the position to take on this additional tonnage at the present time" (Ex. 41, R. Vol. VIII, 154, R. 269). It then added (*Id.* at 272):

"Perhaps if you are still interested at a later date and our situation changes, we will be glad to look into the matter further at that time." [19]

In January 1944 Continental could enter into a contract with Imperial, and thereafter through the life of the contract make no request of respondents, only because it knew that oxide was plentiful (*supra*, pp. 8, 23). Petitioners themselves have emphasized that vanadium oxide then "was in over supply" (Pet. Br., p. 56). Many opportunities to obtain a regular supply were spread on the record. Illustrative perhaps are the 50,000 pounds of oxide available to Continental in January 1944 (Ex. U-4-B, R. 936-937). Then in March 1944 Blanding, which had supplied oxide to Continental in a prior period, reported it had an output of 15,000 pounds a month which it would expand to 50,000 pounds per month if Continental would provide financial assistance, but Continental declined; it then offered to sell its entire output up to 20,000 pounds per month for a period of nine months, which was also declined; and finally offered to sell an existing stock of 12,000 pounds of oxide, which was similarly declined (Ex. V-2-K, R. 2533-2553, 1715-1719; Ex. V-2-L, R. 2554, 1715-1726).

There may be many explanations of the termination of the Imperial contract (*supra*, pp. 27-29). But the explanation cannot be found in either a non-existent inability to obtain oxide or any act of any respondent.

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[19] Petitioners argue that their requests to VCA and Electromet in November 1943 "were jointly refused" (Pet. Br., p. 57). Actually, there were separate and different replies on different dates (Ex. 41, Vol. VIII, 154, R. 270; Ex. 42, R. Vol. VIII, 156, R. 271).

Petitioners similarly argue that "Burwell testified that Electromet did not sell oxide to Mr. Leir at this very time because respondents wanted 'to keep him out of the vanadium business'" (Pet. Br., p. 58). Burwell had been asked only about the request to his company and at most was testifying about the reasons he thought his company had; nothing suggests that he knew anything of the request of VCA or anything of the reasons for its reply (R. 546-547).

It is evidently at one point in this same Imperial peri[od] that respondents are supposed to have "thwarted pet[i]tioners' plan" to erect a ferrovanadium plant on the Col[o]rado Plateau (Pet. Br., p. 61). The only record mention [of] such a "plan"—and the only reference cited by petitione[rs] —is in part of a VCA exhibit introduced to show the avai[l]ability of Blanding oxide and petitioners' refusal to take [it] (Ex. V-2-K, R. 2533-2544, 1715).

The exhibit petitioners cite itself shows the nature of t[he] "plan". What petitioners now rely on as an undertakin[g] by Continental "to construct a plant" (Pet. Br., p. 61) ap[]pears in a sentence in a draft agreement Leir sent Blandin[g] in March 1944 (Ex. V-2-K, R. 2537-2543, 1715). The s[o-]called undertaking was expressly conditioned on Blanding[']s production of 50,000 pounds of oxide a month and it was al[so] to "be apparent that such production can be maintaine[d] over a reasonable period thereafter" (*Id.* at 2541-2542)—production Blanding itself said it could not attain witho[ut] further financial assistance (*Id.* at 2545). Moreover, Leir['s] draft agreement contained merely an undertaking by Co[n]tinental "to receive delivery" of Blanding's entire outp[ut] "as the same shall or may be specified for delivery fro[m] time to time by Continental" (*Id.* at 2538). Blanding note[d] that throughout Leir's draft "Continental 'undertakes,' an[d] in most instances, Blanding 'agrees' "; it insisted that Co[n]tinental agree to take the entire output, subject to thre[e] or six months notice (*Id.* at 2544-2545). Continent[al] promptly refused (*Id.* at 2550-2551).

In short, Continental was unwilling either to suppl[y] financial assistance or commit itself to take deliveries, an[d] Blanding was unwilling to obtain financing elsewhere wit[h]out a commitment from petitioners (*Id.* at 2544-2551). Th[e] reason for the end of the "plan" to construct a plant—whic[h] petitioners assert here for the first time in this litigation—is clear and uncontradicted.

Summary of Argument

Set forth above are the material details of the proof relating to petitioners' ventures in the vanadium business and to the reasons they assign for the termination of these ventures.

In both courts below respondents contended the record could not sustain a finding for petitioners. The question became moot in the trial court when the jury returned a general verdict for respondents. It became determinative in the Court of Appeals which concerned itself only with the question whether there was sufficient proof of "a causal connection" between the respondents' alleged wrongdoing and petitioners' alleged loss, without consideration of the unrelated errors petitioners had specified (R. 2572). And the Court of Appeals, finding the proof of this causal connection insufficient, affirmed the judgment entered for respondents on the jury verdict (R. 2572-2573, 2583).

The limited questions presented here, simply stated, are (1) whether proof of such causal connection, or fact of damage to petitioners' business, is necessary, (2) whether petitioners' proof was sufficient, and (3) whether petitioners' alleged loss of sales by the concededly valid acts of the Canadian Government were admissible for the purpose of proving such fact of damage.

When these questions are viewed against the record, without the distortions and insinuations petitioners have included in the questions presented for certiorari, it becomes abundantly clear that the Court of Appeals applied only well settled rules, that its decision in no way conflicts with applicable decisions of this Court or of any Court of Appeals and involves no question of law which has not long been settled by this Court, and that what petitioners

propose here are new principles without support in precedent, reason or policy.

1. The requirement that a plaintiff in a treble damage action prove that he was in fact injured by the alleged violation of the antitrust laws—whether expressed as causal connection or relation, fact of damage or proximate result—has long been settled. It is a requirement which distinguishes the private action from the Government action. It is dictated by the statute which gave petitioners their right of action. It was early established in this Court and most recently reaffirmed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946). It has been uniformly imposed by the lower courts.

Without such proof, principle clearly requires and the courts have uniformly held, dismissal of petitioners' complaint was mandatory.

The case was brought and tried with full recognition of this additional burden on the private suitor. Now, however, because of their failure of proof and on the basis of a distortion of *Bigelow*, petitioners propose an abandonment of the requirement of the statute and the creation of an inference of causal connection merely from the assumed fact of antitrust violation. A treble damage plaintiff, on petitioners' theory, recovers whenever he can show an antitrust violation and that his business failed, whatever the reasons for his failure.

2. Petitioners were not "deprived of a trial by jury," as petitioners suggest in Question 3 (Pet. Br., p. 5). Nor is there any conflict, direct or otherwise, with *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), as petitioners there also represented to the Court (*Ibid.*). Significantly, petitioners cite but never discuss *Beacon Theatres* (Pet. Br., pp. 71, 92, 93). There the courts below had denied

petitioners' request for a jury trial of the factual issues in the case (359 U. S. at 501, 503-504). Here petitioners had a jury trial.

No one disputes the constitutional right to a jury trial. Similarly, no one can now dispute, under the settled rules of this Court, the right and duty of a court to review the record to determine whether the evidence is sufficient to sustain a verdict for plaintiff and to direct a verdict for defendant when the evidence is insufficient. However the quantum and quality of the necessary proof be expressed, manifestly the judgment for respondents here must be affirmed in the absence of evidence to sustain a rational, honest and reasonable finding in petitioners' favor with respect to an essential element of their cause of action.

3. The final question relates to the exclusion of evidence relating to petitioners' alleged loss of a Canadian customer as a result of acts in Canada by a Canadian subsidiary of Union Carbide, concededly acting as the agent of the Canadian Government for the wartime purchase and allocation of vanadium for Canadian steel firms.

Basic and settled questions of policy are involved. The issue here is not whether the Union Carbide Canadian subsidiary was directed or instigated by corporate affiliates in this country or whether they in fact had anything to do with petitioners' loss of the Canadian customer; we necessarily assume *arguendo* everything petitioners asserted in their offer of proof. Nor is the issue now whether such activities in this country could be evidence to support a charge of conspiracy or intent to monopolize or would be admissible in a Government action; we necessarily assume too, because of the questions on which certiorari was granted, that the other evidence in the record was sufficient to sustain a finding of violation of the statute.

The sole issue now is whether petitioners can establish the fact of damage or injury to them by proof of the act of the Canadian Government, and recover damages for the loss allegedly suffered as a result of such act—an issue which inevitably brings into dispute the reasons why that Government acted as it did and whether it was in fact in any way affected by the claimed persuasion or instigation of the alleged conspirators. Both courts below recognized that that issue necessarily involved a determination with respect to the acts of a sovereign power and was not within the purview of the Sherman Act.

We submit the result below was clearly dictated by established principles of comity, sovereign immunity and the extraterritorial limitations of the antitrust laws settled by this Court in *American Banana Co. v. United Fruit Company*, 213 U. S. 347 (1919), reaffirmed with respect to foreign sovereigns as recently as *Steele v. Bulova Watch Co., Inc.*, 344 U. S. 280, 288 (1952), and for similar considerations recently applied to valid governmental action in this country in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961).

ARGUMENT

QUESTION 1

Proof of a causal connection between respondents' alleged antitrust violations and the alleged failure of petitioners' vanadium business ventures was an essential element of petitioners' cause of action. Without such proof there was no issue for the jury.

Section 4 of the Clayton Act grants a right of action to anyone "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. §15. "As the statutory language suggests, recovery under section 4 of the Clayton Act, as under its predecessor, §7 of the Sherman Act, . . . 'cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted,' Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156, 165 (1922)." *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906, 909 (2 Cir. 1962).

Petitioners' complaint therefore alleged that their elimination from the vanadium industry had been "proximately caused" by respondents' alleged violations of the Sherman Act (R. 16, par. 30; R. 23, par. 45). Consistently, their proposed instructions to the jury recognized that a plaintiff, to recover in a private action, must establish not only acts in violation of the statute but also "that these acts had a proximate impact on his business or trade which caused injury to it" (R. 57, No. 14). Consistently, too, the trial court charged the jury, without objection, that petitioners had to prove that the allegedly unlawful acts "injured them and were the direct, immediate and proximate cause of such injury" (R. 2026).

Thus there was agreement below that petitioners' burden included proof of causal connection between respondents' alleged violation of law and their injury. And the Court of Appeals included such causal connection as one of the three essential elements of a private action (R. 2572):

> "(1) That the defendant has violated the antitrust laws; (2) that plaintiff has suffered an injury to his business or property susceptible of being described with some degree of certainty in terms of money damages; and (3) that a causal connection exists between the defendant's wrongdoing and the plaintiff's loss."

The Court of Appeals then concluded, assuming *arguendo* the sufficiency of the evidence to support the first two elements of their cause of action, that petitioners' evidence was nonetheless "insufficient to justify a jury verdict that this necessary causal relation existed" (R. 2572-2573).

Question 1, as framed by petitioners in their petition for certiorari, proposed an unsupported and extreme proposition of law (Pet. Br., p. 4). Simply stated, petitioners' position is that causal relation may be inferred by the jury, without further proof, where the "question of violation is confessed," "measurement of damages is more than sufficiently supported by relevant economic data," and "the destruction of the plaintiff" can be found to have been "an important goal" of the respondents. In short, petitioners seem to contend in their first legal argument (Pet. Br., pp. 74-90), a jury may find for a plaintiff without proof that the alleged purpose and intention to eliminate him was actually effected by the defendant and whether or not his elimination or withdrawal resulted from circumstances completely unrelated to anything done by the defendant. That is the contention answered in this section of this brief.

Petitioners' argument, however, sometimes obscures the nature of the extreme proposition they are urging in Question 1. For instance, they state in the course of their argument that "causation is proved upon the showing of impact or contact" (Pet. Br., pp. 74-75). There are still other references to alleged "contact" or "impact" on petitioners (*e.g.*, Pet. Br., pp. 70, 76, 78). Later petitioners find it "undeniable" that respondents' conduct "had a direct, immediate and injurious impact on petitioners, who were, as a result of these activities, unable to remain in the vanadium industry" (*Id.* at 79-80). If petitioners thereby intend to concede the necessity of proof of causal connection, there is no dispute except with respect to the sufficiency of their proof to support a jury verdict. That is a separate issue, presented by Question 2 and discussed below (pp. 61-70).

A. It Has Been Consistently Held That a Plaintiff in a Private Action Must Prove a Causal Connection Between His Losses and Defendant's Antitrust Violations.

Petitioners' allegations of proximate cause were dictated by well-settled rules. "In a private antitrust suit, the plaintiff must not only allege a violation of the antitrust laws, but damage to the plaintiff proximately resulting from the acts and conduct which constitute the violation." *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358, 362 (9 Cir. 1955). In accord, *e.g.*, *Association of Western Railways* v. *Riss & Company, Inc.*, —— F. 2d ——, CCH 1962 Trade Cases ¶70,204, p. 75,751 (D. C. Cir. January 25, 1962).

Such allegations, of course, must be proved. It is not enough that a plaintiff prove that "a defendant has injured its competitors generally . . . in the absence of evi-

dence that would justify a finding of injury to the particular plaintiff." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F. 2d 906, 909-910 (2 Cir. 1962). "The courts have held uniformly that it is a prerequisite to the maintenance of an action under the antitrust laws by a private suitor that the plaintiff prove that he was damaged as a direct result of defendant's violation of the Sherman Act." *Sperry Products Inc. v. Aluminum Company of America*, 171 F. Supp. 901, 938 (N. D. Ohio 1959), affd. on this issue 285 F. 2d 911, 927 (6 Cir. 1960), cert. denied 368 U. S. 890 (1961). And proof of loss of profits does not itself "establish that such loss was a proximate result" of the allegedly unlawful acts. *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F. 2d 731, 737-738 (9 Cir. 1959).

However the essential elements of the private action be expressed, one is proof of the "causal connection" or "causative relation" between defendant's wrongful act and plaintiff's loss, referred to by the court below and in a myriad of other cases. *E.g., Momand v. Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (1 Cir. 1948), cert. denied 336 U. S. 967 (1949), reh. denied 337 U. S. 934, 961 (1949); *Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 250 (2 Cir. 1959), cert denied 361 U. S. 885 (1959); *Monticello Tobacco Co. v. The American Tobacco Co.*, 197 F. 2d 629, 633 (2 Cir. 1952), cert. denied 344 U. S. 875 (1952); *E. V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.*, 252 F. 2d 473, 477 (9 Cir. 1958), cert. denied 356 U. S. 951 (1958); *The Flintkote Company v. Lysfjord*, 246 F. 2d 368, 392 (9 Cir. 1957), cert. denied 355 U. S. 835 (1957); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950, 958 (10 Cir. 1959), cert. denied 363 U. S. 843 (1960).

This insistence on proof of causal connection, of course, necessarily follows from the basic difference between a pri-

vate and public action under the antitrust laws. The Government action protects the public generally. The private action was intended to give additional protection to "the victims of the forbidden practices." *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957). Thus a "private person has no right to complain of a violation of §1 or §2, as such, nor does such a violation per se give rise to a private cause of action. . . . It is only when a violation of §1 or §2 causes *damage* that a cause of action inures to private benefit and then only to the extent of the trebled amount of such damage. Consequently, forbidden acts cannot be relevant unless they *cause* private damage." *Wolfe* v. *National Lead Co.*, 15 F. R. D. 61, 63 (N. D. Cal. 1953), affd. 225 F. 2d 427 (9 Cir. 1955), cert. denied 350 U. S. 915 (1955); *Hunter Douglas Corporation* v. *Lando Products*, 235 F. 2d 631, 638 (9 Cir. 1956).

Causal connection here is the *fact* of damage. Indisputably, under the general rule, "[c]ertainty in the fact of damage is essential." *Palmer* v. *Connecticut Railway & Lighting Company*, 311 U. S. 544, 561 (1941). To be sure, there need not be absolute certainty. But there must be proof that comes to more than speculation, surmise or conjecture (*infra*, pp. 64-65)—whether it be expressed as proof to a "reasonable certainty," as in *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 958 (10 Cir. 1959), cert. denied 363 U. S. 843 (1960); or to a "reasonable probability," as in *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F. 2d 473, 477 (9 Cir. 1958), cert. denied 356 U. S. 951 (1958); or to a "fair degree of certainty," as in *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (1 Cir. 1948), cert. denied 336 U. S. 967 (1949), reh. denied 337 U. S. 934, 961 (1949).

Nor is petitioners' burden met by the testimony which, they repeatedly claim, shows that it was the "specific inten-

tion" of respondents "to eliminate these petitioners from the vanadium industry" (Pet. Br., p. 68; see also pp. 69, 70, 78, 79).[20] Inherent in every conspiracy to monopolize is a purpose or intent to exclude or eliminate competition. The competitor claiming treble damages must nonetheless prove that he was excluded or eliminated as a result of the conspiracy. A "finding that the conspiracy [has] not damaged the plaintiff [is] therefore a finding that the plaintiff [has] not proved its claim." *Association of Western Railways* v. *Riss & Co., Inc.*, —— F. 2d ——, CCH 1962 Trade Cases ¶75,204, p. 75,751 (D. C. Cir. Jan. 25, 1962). The rule for which petitioners contend would simply abolish the need for proof of causal connection wherever an intent to monopolize has been alleged.[21]

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[20] In their legal argument, as in their statement of the case, petitioners persist in their use of the collective "respondents." Thus they state, without record citation—"Respondents' officers testified they intended to harm petitioners" (Pet. Br., p. 90).

Petitioners can mean only the testimony of Blair Burwell, a former vice-president of one of the Union Carbide subsidiaries, who testified about his company's refusal to sell petitioners in November 1943 and in no way attempted to implicate VCA in this alleged refusal to sell (*supra*, p. 42 note). Certainly no other officer of any respondent testified to any such intent.

[21] Petitioners attempt to buttress their contention with a "legal presumption" that "a conspiracy to eliminate competition continues until it succeeds" (Pet. Br., p. 85). It may be presumed on a special plea of the statute of limitations, as in *United States* v. *Kissel*, 218 U. S. 601 (1910), that conspiracies are continuing offenses.

But nothing in that opinion stands for the proposition that all conspiracies necessarily continue or are necessarily successful, or excludes the possibility that the competitor might eliminate himself or be eliminated by other causes. As this Court indicated in the sentence following the one quoted by petitioners (Pet. Br., p. 85)—"*If* [the conspirators] do continue such efforts in pursuance of the plan the conspiracy continues up to the time of *abandonment* or success" (218 U. S. at 608). And in a treble damage action plaintiff has "the burden of proving that the conspiracy in fact did continue." *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 249 (2 Cir. 1959), cert. denied 361 U. S. 885 (1959).

And wherever there is a failure of proof of causal connection, there is no issue for a jury. "Absent a showing of causal connection between the collusion and jobbers' refusals to handle plaintiff's product, dismissal was mandatory." *Monticello Tobacco Company, Inc.* v. *The American Tobacco Co.*, 197 F. 2d 629, 633 (2 Cir. 1952), cert. denied 344 U. S. 875 (1952). In accord, *e.g.*, *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43 (1 Cir. 1948), cert. denied 336 U. S. 967 (1949), reh. denied 337 U. S. 934, 961 (1949) (directed verdict for defendant); *Wolfe* v. *National Lead Co.*, 15 F. R. D. 61, 63 (N. D. Cal. 1953), affd. 225 F. 2d 427 (9 Cir. 1955), cert. denied 350 U. S. 915 (1955) (complaint dismissed); and *Sperry Products, Inc.* v. *Aluminum Company of America*, 171 F. Supp. 901, 939 (N. D. Ohio 1959), affd. on this issue 285 F. 2d 911, 927 (6 Cir. 1960), cert. denied 368 U. S. 890 (1961) (counterclaim dismissed).

B. Nothing in *Eastman Kodak*, *Story Parchment* or *Bigelow* Dispenses With Proof of Causal Connection or Bars a Directed Verdict in the Absence of Proof of Such Connection.

Petitioners argue the decision below "is in direct conflict" with "three landmark decisions of this court": *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946) (Pet. Br., p. 81). *Eastman Kodak*—although cited in a point heading in petitioners' brief (p. 81)—is nowhere further referred to. *Story Parchment* and *Bigelow* are discussed at length (Pet. Br., pp. 81-90).

Apparent throughout petitioners' argument is a fundamental confusion of the proof required to establish (1) the *fact of damage* or the causal connection between the

alleged violation and their injury, and (2) the dollar *amount of damage* which a plaintiff may recover when he has proved both violation and causal connection. Concededly, damages may be recovered even where they cannot be calculated with exactness and a defendant may not complain when his wrongful conduct has rendered difficult the precise ascertainment of damages. But a plaintiff must nonetheless offer sufficient competent proof that he was in fact injured by a defendant's conduct.

The three decisions of this Court on which petitioners rely made this distinction clear. In all three cases, it was later pointed out, "the illegal practices of defendants constituted the only active cause of plaintiff's injury." *Momand* v. *Universal Film Exchanges*, 172 F. 2d 37, 42 (1 Cir. 1948), cert. denied 336 U. S. 967 (1949), reh. denied 337 U. S. 934, 961 (1949); see too *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F. 2d 906, 913 (2 Cir. 1962). None permitted recovery without proof of causal connection in addition to the amount of damages.[22]

In *Eastman Kodak* plaintiff had indisputably been injured by defendant's act.[23] The only question was whether

[22] The distinction, of course, is not limited to private actions under the antitrust laws. Thus this Court cited *Story Parchment* in a case involving the rejection of a lease in a proceeding under the Bankruptcy Act. *Palmer* v. *Connecticut Railway & Lighting Company*, 311 U. S. 544, 561 (1941):

> "Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion."

[23] Plaintiff, a stock house dealing in photographic supplies, had purchased its goods from defendant on the same terms as other dealers with whom it was thereby able to compete (273 U. S. at 368). Thereafter defendant, having acquired control of other stock houses in plaintiff's city in competition with plaintiff and having unsuccessfully attempted to purchase plaintiff's business, refused to sell plaintiff its goods at the prices at which they were sold to the dealers and agencies defendant controlled and with whom plaintiff

the injury had been inflicted "in furtherance of a purpose to monopolize." Defendant contended that its refusal to continue to sell plaintiff at discounts which would have enabled it to compete "was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract" (*Id.* at 375). But plaintiff's handling of such other goods, as this Court held, could not in itself justify defendant's refusal, if only because "it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff" (*Ibid.*). And this Court found that "the circumstances disclosed in the evidence sufficiently tended to indicate such purpose [to monopolize], as a matter of just and reasonable inference, to warrant the submission of this question to the jury" (*Ibid.*). In a separate section of the opinion this Court thereafter discussed the evidence relating to "the amount of damages" (*Id.* at 376-379).

Again in *Story Parchment*, where this Court reinstated a judgment on a jury verdict for plaintiff, this Court found "sufficient support in the evidence" for the findings that respondents had combined to monopolize interstate trade and that "petitioner was injured in its business and property as a result of this unlawful combination" (282 U. S. at 560). Nowhere did it hold, as petitioners here argue, that proof of conspiracy to eliminate a competitor by the three respondents holding monopoly power and the demise of the competitor "presented sufficient evidence of causation to sustain a verdict" (Pet. Br., p. 81). There was abundant

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therefore could no longer compete (*Id.* at 368-369).

Petitioners here, unlike plaintiff in *Eastman Kodak*, have failed to show injury resulting from respondents' alleged refusals to deal with them or that respondent's prevented them from obtaining supplies elsewhere on terms which would have enabled them to compete, or even that their business was injured because of lack of supplies (*supra*, pp. 29-43).

evidence of causal connection.[24] And this Court again separately considered the question of the amount of damages and emphasized the distinction which petitioners here disregard (*Id.* at 562):

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

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[24] Petitioner in *Story Parchment* claimed it had been injured because it was compelled to sell its products at reduced prices to meet respondents' reduced prices.

This Court's opinion noted that there was "evidence, sufficient to justify the action of the district court in submitting the issue to the jury, that after petitioner began business the three companies combined and conspired to continue" their prior substantial monopoly (282 U. S. at 560). Moreover, "there was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward" (*Id.* at 561). There was also evidence showing the higher prices received by petitioner before, and the lower prices after, respondents' cut prices were put in operation (*Id.* at 561). Finally, there was evidence tending to show that petitioner's losses did not result from any inefficiency in the production or marketing of its product (37 F. 2d at 542).

The injury to petitioner's business was manifestly the proximate result of respondents price cutting. Certainly "it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices" (282 U. S. at 561).

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946), reaffirmed the distinctions made clear in *Eastman Kodak* and *Story Parchment*. There was a conceded unlawful conspiracy to maintain a discriminatory system of distribution (327 U. S. at 254). Petitioners, theatre owners in Chicago, were denied the early releases of motion pictures which were enjoyed by theatres owned or controlled by certain of the respondents and were unable to obtain them until after most of the theatres owned by respondents, several of which competed with petitioners' theatre, had finished their showing (*Id.* at 255-256).

Despite the disagreement in the Court as to whether or not petitioners there had shown the fact of damage, neither opinion suggested that such proof was no longer necessary. "The earlier a playing position," the majority found, "the more desirable it is, since it is preferable to exhibit pictures before they have been shown to the public in other theatres in the competitive area" (327 U. S. at 256). This would seem confirmed by evidence of the reduction of petitioners' receipts during the period of the conspiracy and of the substantially higher receipts of a comparable competing theatre which enjoyed a prior run (*Id.* at 257-258). "Upon the record in this case it is indisputable that the jury could have found that during the period in question a first or prior run theatre possessed competitive advantages over later run theatres, . . . and that, other things being equal, the establishment of the discriminatory release system was damaging to the petitioners, who were relegated by it to a playing position inferior to that of their competitors" (*Id.* at 260). "The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge" (*Id.* at 266). And on the amount of damages, assuming sufficient proof of the fact

of damage, this Court then followed *Eastman Kodak* and *Story Parchment* to permit "a just and reasonable estimate of the damage based on relevant data" (*Id.* at 264).

Thus in *Bigelow* petitioners had clearly shown they were unable to obtain releases of motion pictures, unlike petitioners here who never established they did not have sufficient supplies of oxide or that they could not obtain them. In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), this Court later made it clear that the requirement of certainty in the fact of damage had not been abandoned. It cited *Bigelow* as well as *Eastman Kodak* and *Story Parchment.* "[T]he rule that precludes the recovery of uncertain and speculative damages," it then said, "applies only to situations where the *fact of damage* is itself uncertain" (328 U. S. at 688). Only where the fact of damage is certain, and the "uncertainty lies only in the amount of damages," do *Bigelow, Story Parchment* and *Eastman Kodak* permit "a reasonable inference as to the extent of the damages" (*Ibid.*).

The lower courts have similarly construed the three decisions on which petitioners rely. "These cases," the Court of Appeals for the Third Circuit recently said in affirming a judgment for defendants in a refusal to deal case because there was "no damage or legal injury," "merely stand for the proposition that having established the fact of damage or legal injury, the difficulty of determining the amount of damage will not preclude a recovery." *Lawlor* v. *National Screen Service Corporation*, 270 F. 2d 146, 153 (3 Cir. 1959), cert. denied 362 U. S. 922 (1960). They "have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one." *The Flintkote Company* v. *Lysfjord*, 246 F. 2d 368,

392 (9 Cir. 1957), cert. denied 355 U. S. 835 (1957) (emphasis in original).[25]

"In other words," the Court of Appeals continued in *Flintkote*, "the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage" (246 F. 2d at 392; emphasis in original). And that fact must still be shown with "a fair degree of certainty." As the Court of Appeals said in *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37 (1 Cir. 1948), cert. denied 336 U. S. 967 (1949), reh. denied 337 U. S. 934, 961 (1949) —on which the court below relied (R. 2573)—after discussing *Bigelow, Story Parchment* and *Eastman Kodak* (172 F. 2d at 43):

> "The law has gone far to ease that burden [of strict requirements of proof as to exact quantity of damage] by permitting proof of losses which border on the speculative, in order to implement the policy of the antitrust laws. *But a fair degree of certainty is still essential to show the causative relation of defendants' misconduct and plaintiff's injury.*"

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[25] The two cases in the Ninth Circuit which petitioners cite (Pet. Br., p. 85)—*Richfield Oil Corporation* v. *Karseal Corporation*, 271 F. 2d 709 (1959), and *Fox West Coast Theatres Corporation* v. *Paradise Theatre Building Corporation*, 264 F. 2d 602 (1958)—stand for no different construction of *Bigelow* or any other decisions of this Court. *Richfield* cited the statement from *Flintkote* quoted above and then held plaintiff had proved the causal connection (271 F. 2d at 711-713). *Fox*, which discussed no cases, involved a conspiracy to maintain a discriminatory motion picture distribution system like that in *Bigelow*.

QUESTION 2[26]

The evidence of causal connection was insufficient to support a verdict for petitioners. The Court of Appeals therefore properly affirmed the judgment entered on the jury's verdict for respondents.

The question presented here is whether petitioners "were deprived of a trial by jury" by the judgment of the Court of Appeals (Pet. Br., p. 5).

The essence of petitioners' argument is that "there was a conflict in the evidence on the issue of causation" which they were entitled to have "determined by the jury" (Pet. Br., p. 91), that the trial court was of the opinion that "sufficient evidence was present to submit the case to the jury" and submitted it to the jury (*Id.* at 91-92), that the Court of Appeals erred in reviewing the record to determine whether the evidence was sufficient to support a verdict for petitioners (*Id.* at 92-99), and that the Court of Appeals somehow directed a verdict for respondents (Pet. Br., pp. 91, 92).

Certain aspects of this argument should be clarified at the outset.

First, respondents of course do not question that "it is the jury, not the Court, which is the fact-finding body," as petitioners point out in their quotation from *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U. S. 29, 35 (1944) (Pet. Br., pp. 93-94). This means, as *Tennant* added, that

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[26] The question here discussed is actually the third question on which this Court granted certiorari and appears as Question 3 under "Questions Presented" in petitioners' brief (p. 5).

This question, however, is discussed here as "Question 2," following its designation and the sequence of argument in petitioners' brief (pp. 91-111).

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable" (321 U. S. at 35).

But not all cases are therefore to be determined by juries. Nor do all jury determinations stand. "The rule is settled for the federal courts and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court." *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 343 (1933). See also *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 369 (1913); *Lauria* v. *E. I. du Pont de Nemours & Co.*, 250 Fed. 353, 357 (2 Cir. 1918).

Second, the trial judge reserved decision on respondents' motions for a directed verdict, the jury verdict was for respondents, and the trial court expressly concurred in it (R. 2052). The pending motions for a directed verdict thereby became moot but nothing supports petitioners' inference that the trial judge thought petitioners had presented a jury question on the causation issue (*supra*, p. 4). Had the jury found for petitioners, the trial judge might well have set aside the verdict and directed judgment for respondents.[27]

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[27] The case having been fully tried, the trial judge followed long established practice in submitting it to the jury, even though he might have felt petitioners had not sustained their burden on the causation issue or any other issue. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 659-661 (1935). Otherwise, if he had simply granted respondents' motion for a directed verdict, there would be no jury verdict to reinstate and an entire new trial would be necessary if it were later determined that the case should have gone to the jury.

Third, the Court of Appeals did not direct a verdict for respondents as in the case where it reverses a judgment for petitioners entered on a jury verdict in their favor. Nor is this a case in which disputed factual issues have been disposed of before trial, as in *Poller* v. *Columbia Broadcasting System, Inc.*, —— U. S. —— (February 19, 1962).

The Court of Appeals here merely affirmed "the judgment as rendered" for respondents, on the jury verdict, in the court below (R. 2571). In so doing, it applied the well-settled rule that a "successful party in the District Court may sustain its judgment on any ground that finds support in the record." *Jaffke* v. *Dunham*, 352 U. S. 280, 281 (1957); see also *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937); *Story Parchment Company* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560 (1931); *Langnes* v. *Green*, 282 U. S. 531, 538-539 (1931); *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924). Thus where the evidence is insufficient to support a verdict for a plaintiff—so that a directed verdict could have been granted the defendant in the trial court—the Court of Appeals should affirm the judgment for defendant, without discussion of or regard to the errors claimed by plaintiff. *E.g.*, *Syres* v. *Oil Workers International Union*, 257 F. 2d 479, 484 (5 Cir. 1958), cert. denied 358 U. S. 929 (1959); *United States* v. *J. E. Bohannon Company, Inc.*, 232 F. 2d 756, 757-758 (6 Cir. 1958); *Wonnacott* v. *Denver and Rio Grande W. R. Co.*, 187 F. 2d 607, 608 (10 Cir. 1951); *Monolith Portland Midwest Co.* v. *Western Public Service Co.*, 142 F. 2d 857, 859-860 (10 Cir. 1944); *Nalbantian* v. *United States*, 54 F. 2d 63, 64 (7 Cir. 1932), cert. denied 285 U. S. 536 (1932); *Weidenfeld* v. *Pacific Imp. Co.*, 43 F. 2d 817, 820 (2 Cir. 1930), cert. denied 282 U. S. 890 (1930).

Here affirmance was on the ground that the evidence of the necessary causal relation was insufficient and that the

trial judge, if the verdict had been for petitioners, would have been obliged to direct a verdict for respondents (R. 2572-2573). Patently it was proper for the Court of Appeals to review the record, and we submit its conclusion was in all respects correct.

A. The Sufficiency of the Evidence Is Always a Question of Law

"Whether the evidence was sufficient or otherwise," when respondents moved for a directed verdict, "was a question of law to be resolved by the court." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 659 (1935). And in determining the sufficiency of the evidence in a civil or criminal case, as Judge Learned Hand put it, the question is whether it "will rationally support a finding in favor of the party having the affirmative." *United States* v. *Sherman*, 171 F. 2d 619, 621 (2 Cir. 1948), cert. denied *sub nom. Grimaldi* v. *United States*, 337 U. S. 931 (1949).

A verdict will "normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion." 5 Moore, *Federal Practice* (2d Ed. 1951) ¶50.02, P. 2314; *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930). Indeed, "where proven facts give equal support to each of two inconsistent inferences," this Court has said, "judgment, *as a matter of law*, must go against the party upon whom rests the necessity of sustaining one of those inferences as against the other, before he is entitled to recover." *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 339 (1933). And "the essential requirement is that mere speculation be not allowed to do duty for probative facts." *Galloway* v. *United States*, 319 U. S. 372, 395 (1943), reh. denied 320 U. S. 214 (1943).

These same rules apply, of course, to private actions under the antitrust laws. Petitioners' burden was to prove causal connection to a "reasonable certainty," or a "reasonable probability" or to a "fair degree of certainty" (*supra*, p. 52). The evidence must be "substantial." *Rushing v. Metro-Goldwyn-Mayer Distributing Corp. of Texas*, 214 F. 2d 542, 544 (5 Cir. 1954). No more than in other fields may a jury verdict rest on "speculation, surmise, and conjecture." *Wolfe v. National Lead Company*, 225 F. 2d 427, 433-434 (9 Cir. 1955), cert. denied 350 U. S. 915 (1955). Here too the Court of Appeals, in testing the sufficiency of the evidence, is entitled to disbelieve the testimony of petitioners' witnesses when such testimony is inconsistent with the facts, circumstances and documentary evidence. *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F. 2d 561, 567 (7 Cir. 1951), cert. denied 342 U. S. 909 (1952). And, as in any other case, it may disregard petitioners' self-serving conclusions where they "offered no evidence to substantiate such conclusions." *Rushing v. Metro-Goldwyn-Mayer Distributing Corp. of Texas*, 214 F. 2d 542, 544 (5 Cir. 1954).

B. The Evidence Was Palpably Insufficient to Support a Verdict for Petitioners

Petitioners' four ventures in the vanadium business have been discussed at length (*supra*, pp. 14-29), together with the reasons petitioners allege for their failure (*supra*, pp. 29-43). We have discussed, in their proper time sequence and with reference to the ventures to which they were supposed to relate, each of petitioners' thirteen so-called "requests for vanadium oxide from respondents" (*supra*, pp. 31, 32-33, 39, 42).

These facts need not be reviewed again. Nor is it necessary here to meet each of petitioners' trifling disagreements with the Court of Appeals' summary of the evidence (Pet. Br., pp. 100-111).

Petitioners, of course, had to prove good faith requests for oxide from respondents. Obviously they could not have been damaged by the denial of what they did not request. As stated in *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251 (2 Cir. 1959), cert. denied 361 U. S. 885 (1959):

> "Finally, appellant complains that its failure to make a demand to the distributors should not be considered fatal to its claim. * * * As we have previously held, and recently reiterated: '[P]laintiffs cannot recover damages on account of any failure to obtain feature pictures for first-run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy.' J. J. Theatres, Inc. v. Twentieth Century Fox Film Corp., 2 Cir., 1954, 212 F. 2d 840, 845, quoted and followed in Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 2 Cir., 1959, 263 F. 2d 533, 536; accord, Milwaukee Towne Corp. v. Loew's Inc., 7 Cir., 1951, 190 F. 2d 561, 568, certiorari denied, 1952, 342 U. S. 909, 72 S. Ct. 303, 96 L. Ed. 680." [28]

But the sporadic requests and refusals themselves do not prove petitioners' cause of action. They must also prove they were injured by the refusals of their requests. Petitioners add nothing by their suggestion that their thirteen alleged requests were "jointly refused" (Pet. Br., p. 95), when only twice over a period of four years—in June 1941 and in November 1943—did petitioners make contemporaneous or similar "requests" of both VCA and Electromet, and on both occasions received separate and different replies (Ex. 41, R. 271-272; Ex. 42, R. 273; *supra*, p. 42 note).

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[28] Also in accord: *Lawlor* v. *National Screen Service Corporation*, 270 F. 2d 146, 153 (3 Cir. 1959), cert. denied 362 U. S. 922 (1960); *Columbia Pictures Corp.* v. *Charles Rubenstein, Inc.*, 289 F. 2d 418, 421 (8 Cir. 1961); *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188, 198-199 (9 Cir. 1958).

There is still no injury to them on a record which fails to show that the supplies of oxide they had obtained from respondents and others were inadequate or that they ever lost a single sale because of lack of oxide. Nor is there any injury attributable to respondents where the evidence demonstrates that whatever difficulties petitioners may have had were actually the result of wartime shortages and restrictions. See *Wolfe* v. *National Lead Company*, 225 F. 2d 427, 433-434 (9 Cir. 1955), cert. denied 350 U. S. 915 (1955).

Nor did the Court of Appeals require that petitioners prove, as they now argue, that they also "sought and exhausted every conceivable alternative source of supply" (Pet. Br., p. 95). The Court of Appeals merely noted, as the uncontradicted evidence shows, that petitioners had other established supplies and sources available at the times they claim they were injured by respondents' alleged refusals, and this availability was certainly material. *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188, 198 (9 Cir. 1958).

So too petitioners add nothing by the inclusion in their legal argument of various other distortions of the record and inferences which cannot rationally be supported by the record. Thus, nothing is added by petitioners' references to "shattering injurious impact" when they attempt to support it by such statements as that "Apex was not obtaining sufficient quantities of oxide to run its mill at half capacity" (Pet. Br., p. 96)—when the uncontradicted evidence shows that Apex had all the oxide it needed and when the document on which petitioners rely itself shows even more oxide was available.[29] No less transparent

[29] Petitioners cite "D's. V's. Ex. V-1-A; R. 2512A, 1142" (Br., p. 96). Presumably they intended to refer to Exhibit V-1-Q at R. 2512A, and not to Exhibit V-1-A which was received in evidence at R. 1002 and is reprinted at R. 2487-2488.

Exhibit V-1-Q is a letter from Apex to Leir dated September 17, 1941 (R. 2511-2512A). It shows that Apex could then obtain

on the record before this Court is petitioners' claim that, "just before termination of its relationship with petitioners, Apex was unable to obtain oxide supplies after repeated requests" (Pet. Br., p. 96).[30]

Equally frivolous is petitioners' argument that "Apex capitulated shortly after Blanding Mines informed it that Blanding could no longer supply it with a supply of oxide" (Pet. Br., p. 96)—in the face of uncontradicted evidence that Apex had about 50,000 pounds of oxide on hand (*supra*, p. 34); that Apex had received no oxide from Blanding in about a year (*supra*, pp. 36-37); that it had at least one other very substantial regular supplier who continued with Apex and thereafter with Leir (*supra*,

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regular supplies of oxide from National Vanadium, but declined the opportunity (R. 2512; see also *supra*, p. 32).

Other uncontradicted evidence precludes the inference that Apex at that time was unable to obtain oxide. Only a month later Apex wrote Leir that Shattuck had been shipping 12,000 to 18,000 pounds of oxide "to us every couple of weeks" (Ex. V-1-S, R. 1155-1157). At the end of the year Apex had over 45,000 pounds on hand (Ex. 143, R. 1306-1307).

Perhaps Apex did not think operations at more than half capacity were warranted by the demand for its ferrovanadium. Perhaps the explanation is in the testimony of an Apex officer that it was not "until sometime late in 1941" that it completely solved its production difficulties (R. 1351). Perhaps there were other reasons but, whatever they were, shortage of oxide or acts of respondents were not among them.

[30] Here petitioners rely on Apex's December 1941 request of Defense Plant Corporation for part of the output of the new plant then being erected at Monticello, Utah (Ex. 144, R. 2266, 1313).

One simple answer is that Apex, at the time of its request, was not even in operation because it was rebuilding the plant destroyed by a fire (*supra*, p. 34 note). Another is that Apex then had almost 50,000 pounds of oxide on hand (*Ibid.*). Still another is that the request—which was to Defense Plant Corporation, not respondents—led the next month to what Leir himself said were assurances of ample supplies (Ex. V-2-A, R. Vol. IX 603, R. 1176) and to what petitioners themselves here claim were "assurances of governmental cooperation in obtaining additional supplies" (Pet. Br., pp. 104-105).

pp. 32, 35); that Apex had previously made clear its desire to discontinue vanadium operations for other reasons (*supra*, pp. 16-19); that its subsequent decision to discontinue was not related to oxide supplies (*supra*, pp. 16-20, 34-35); and Leir's own testimony that Apex, at the time of the termination, was able to get supplies (R. 1175).

Nor can petitioners reasonably infer that "VCA had interfered with Apex so as to cause petitioners' manufacturing associate Apex to leave the vanadium business" (Pet. Br., p. 99; see also p. 105)—when the uncontradicted evidence is that Apex approached VCA to see whether it would be interested in buying its supplies and equipment after it had served repeated notices on Continental that it was discontinuing operations and when VCA's total "interference" was to purchase, two months later, Apex's supply of magnesite (*supra*, pp. 20, 36).

The varied other claims have no more to support them. The entire record on causation can be read as a whole, and petitioners may have the benefit of all inferences and presumptions the evidence can support. It still cannot rationally support the necessary finding of causal connection because the indisputable evidence is that none of the alleged acts of any of the respondents contributed in any way to petitioners' alleged injury or damage (*supra*, pp. 16-20, 30-37).

Certainly, no jury could find that the alleged refusals to sell oxide to petitioners injured them in their three manufacturing ventures when the record also shows that petitioners had adequate supplies of oxide and that additional supplies were available (*supra*, pp. 30-39, 41-42). Nor could the jury infer anything about the fourth venture, the mysterious "pending negotiations" with Climax—even assuming interference with negotiations can cause an injury to business, contrary to *Peller v. International Boxing Club, Inc.*, 227 F. 2d 593 (7 Cir. 1955). The record never dis-

closed what the negotiations were, whatever happened to them, or in what way respondents are supposed to have interfered with them (*supra*, pp. 24-27, 40). A recovery on this record would be merely for the alleged public wrong which might support a Government action and without regard to any private injury to petitioners, contrary to the statute and all the decided cases (*supra*, pp. 48-60).

QUESTION 3

Evidence of the acts of a Union Carbide subsidiary as an agent of the Canadian Government was properly excluded.

There remains only the question whether petitioners can claim damages from respondents for their elimination in 1943 from the Canadian market, alleged to have been effected by a Union Carbide subsidiary in Canada acting as a wartime agent of the Canadian Government (Question 2, Pet. Br., pp. 4-5).

The trial court had instructed the jury that acts of this Carbide subsidiary, Electromet of Canada, "performed as an agent of the Canadian Government . . . would not be a basis for liability on the part of Union Carbide" (R. 2036-2037).[31] The Court of Appeals agreed: Electromet of Canada "was acting as an arm of the Canadian Government, and we do not see how such efforts as appellants claimed defendants took to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act. See *Eastern Railroad Presi-*

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[31] This instruction was not assigned as error in the Court of Appeals and therefore any error in it was waived. *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F. 2d 709, 722 (9 Cir. 1959). Petitioners, however, did assign as error the exclusion of certain evidence with respect to the Canadian episode (R. 2058).

dents Conference v. *Noerr Motor Freight, Inc.*, 81 S. Ct. 523, 5 L. Ed., 2d 464" (R. 2580).

We will not discuss in detail the facts on which petitioners rely. Moreover, we again leave to the brief of the Union Carbide respondents the question of the authority of the Electromet employee Arrouet to act for them (*supra*, p. 40 note). But it must be noted in behalf of VCA that petitioners' offer of proof was limited to alleged acts and statements of employees of the Union Carbide respondents and did not implicate VCA. Thus petitioners offered to prove that Electromet of Canada was "acting under instructions from the officials of Union Carbide or its affiliates in order to eliminate the plaintiff from the Canadian market" (R. 827), "that it was the Carbide officials and employees which directed their wholly-owned and controlled subsidiary . . . to eliminate the plaintiff from the Canadian market" (R. 828), and "that it was the intent and purpose of the Carbide officials and employees to use the Canadian agency for the purpose of restraining the plaintiff's trade, and specifically for the purpose of carrying out the conspiracy to restrain and to monopolize the vanadium industry in the United States and Canada" (R. 828).

Nowhere in his offer of proof did petitioners' counsel charge that VCA knew anything about the acts of Carbide or its subsidiaries with respect to Canadian sales or that the offered proof would link those acts to any alleged conspiracy with VCA. Nothing in it supports petitioners' present characterization of the proof in its brief—*e.g.*, that "Union Carbide conspired with the other respondent VCA to use the Canadian subsidiary" (Pet. Br., p. 113) and that Electromet of Canada's agency relationship with the Canadian Government "was used by Union Carbide and VCA to further their monopoly and conspiracy" (*Id.* at 124).

Even if it be assumed that petitioners' offer of proof was sufficient to include VCA and that the facts are as petitioners contend, the damages they claim for their elimination from the Canadian market are nonetheless not recoverable from these respondents.

Petitioners conceded in their complaint and at the trial—as they concede here (Pet. Br., p. 113)—that Electromet of Canada was in fact the agent of the Canadian Government for the purchase and allocation of vanadium for Canadian steel firms (R. 19-20, par. 36; R. 809). They have no question about the appointment of Electromet of Canada or of the statute under which it was appointed (R. 809). Moreover, they emphasize that this is not an action against the Canadian Government and that neither that Government nor its Office of Metals Controller is charged with any illegality in this case (Pet. Br., pp. 112, 114).[32]

Only a limited issue is presented here. It does not involve the power of an American court to enjoin the alleged activities of the Union Carbide affiliates in this country or the admissibility of the evidence of such activities in support of a claim that the law has been violated. Petitioners in this private action now claim injury and damages only for the

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[32] Electromet of Canada was never served (R. 830) and no objection of sovereign immunity has been interposed.

It is evident, however, that Electromet of Canada, engaged in the wartime purchase and allocation of essential vanadium, was performing a vital government function. For instance, the "supplying of oil to insure the maintenance and operation of a naval force—and in this day and age, an air force—is certainly a fundamental government function serving a public purpose. See Berizzi Bros. v. The Pesaro (1926), 271 U. S. 562, 46 S. Ct. 611, 70 L. Ed. 1088." *In re Investigation of World Arrangements, etc.*, 13 F. R. D. 280, 290 (D. D. C. 1952). Electromet of Canada, acting as its agent, was indistinguishable from the Canadian Government and clearly it would enjoy sovereign immunity for acts done as agent of the government (*Id.* at 291).

concededly valid final act of the Canadian Government—its refusal to buy Van Ex from them for a Canadian steel firm. And this is the act, with the necessary inquiry into its propriety and motivation, that precedent and policy place beyond the Sherman Act and which the courts in this country will not judge.

It has long been settled, of course, that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U. S. 250, 252 (1897); *Oetjen* v. *Central Leather Company*, 246 U. S. 297, 303 (1918); *Ricaud* v. *American Metal Company, Limited*, 246 U. S. 304, 309 (1918). Both courts below recognized that petitioners' position, however phrased, necessarily required a forbidden inquiry into, and a determination with respect to, the acts of a sovereign power.

The trial judge, in the extended colloquy with counsel, repeatedly gave this simple basis of his exclusion of the offered evidence (R. 803-839). For instance, "[t]he final act was the act of the Canadian Government. . . . we can't say that what the Canadian Government did was right or wrong. We accept it as it is" (R. 812). "It would be in the nature of this court reviewing an act of the Canadian Government" (R. 816). Finally, "we cannot review a decision by the Canadian Government; it is not within the jurisdiction of this Court" (R. 832). The Court of Appeals was affected by these same considerations. It could not see how the alleged acts of Electromet of Canada "acting as an arm of the Canadian Government" or the other alleged efforts "to persuade and influence the Canadian Government through its agent," were within the purview of the Sherman Act (R. 2580).

The Court of Appeals' reference to *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), was altogether appropriate. *Noerr* is more than the "narrow and specific holding" that petitioners read in it (Pet. Br., p. 120). In *Noerr* the individual truck operator plaintiffs also claimed to be injured by governmental action—there the veto of the "Fair Truck Bill" by the Governor of Pennsylvania (365 U. S. at 130). And this Court in *Noerr* restated the rule of *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939), and *Parker* v. *Brown*, 317 U. S. 341 (1943)—"where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out" (365 U. S. at 136). "These decisions," it explained, "rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution" (*Ibid.*).[33]

United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 560 (1939), was an action to compel compliance with an order of the Secretary of Agriculture which had allocated market areas and fixed minimum prices of milk, just as the Canadian Government through Electromet had regulated the purchase and allocation of vanadium in Canada. This Court there rejected the defense that the order had been adopted pursuant to a conspiracy of milk

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[33] Subsequent decisions in *Baltimore & Ohio Railroad Company* v. *New York, New Haven & Hartford Railroad Company*, 196 F. Supp. 724 (S. D. N. Y. 1961), and *Parmalee Transportation Company* v. *Keeshin*, 292 F. 2d 794 (7 Cir. 1961) relied on *Noerr* in holding that attempts to influence the actions of the Interstate Commerce Commission were not within the purview of the Sherman Act irrespective of defendants' motives in seeking such action.

producers to obtain a monopoly in violation of the Sherman Act. Later, in *Parker* v. *Brown*, 317 U. S. 341, 350-351 (1943), this Court held the Sherman Act did not apply to a state regulatory system or restrain "a state or its officers or agents from activities directed by its legislature." Still later in *Noerr* this Court said of *Rock Royal Co-operative, Inc.* (365 U. S. at 139):

> "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in *United States* v. *Rock Royal Co-op.*, where it was said: 'If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. *If the Act and Order are otherwise valid, the fact that their effect would be to give coöperatives a monopoly of the market would not violate the Sherman Act . . .*'"

Thus *Noerr* reaffirmed the rule that damages may not be claimed under the Sherman Act for consequences of valid government actions, and gave further support to the fundamental refusal to judge acts of sovereigns. The same rule had been applied much earlier to acts of foreign sovereigns in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909). The Sherman Act was there held inapplicable to defendant's successful efforts, with the help of the Costa Rican Goverment acting at its instigation, to exclude plaintiff from the Central American banana trade with the United States. The Court there said (213 U. S. at 357):

> "We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

specified by petitioners in that Court so that, if none is shown to have occurred or to have prejudiced petitioners, respondents may retain the benefit of the jury verdict in their favor and the affirmance of the judgment may stand.

Dated, March 31, 1962.

Respectfully submitted,

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